88-758

No. ———

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

EUGENE MCDOWELL,
Petitioner,

v.

DYNAMICS CORPORATION OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTIONS PRESENTED

Federal Rule 30(f)(1) specifies that the reporter before whom a deposition is taken "shall promptly file it with the court in which the action is pending." The reporter in this case failed to do so, with the result that summary judgment was entered against petitioner.

1. Did the Sixth Circuit err in penalizing petitioner for the reporter's failure to follow the Rule, contrary to decisions from the Fifth and Eleventh Circuits?

2. Did the Sixth Circuit err in concluding that it had no power to consider the deposition on appeal, contrary to decisions from the District of Columbia, Second, Eighth, and Eleventh Circuits, but consistent with decisions from the Third, Fifth, Seventh, and Tenth Circuits?

PARTIES TO THE PROCEEDINGS

Petitioner Eugene McDowell was plaintiff-appellant below; respondent Dynamics Corporation of America was defendant-appellee. Dynamics Corporation of America brought in Harold Johnson and Danny Eugene Towles as third-party defendants, but they did not participate in the proceedings before the Court of Appeals.

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EUGENE MCDOWELL,

Petitioner,

v.

DYNAMICS CORPORATION OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioner Eugene McDowell respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit entered in the above-entitled proceeding on June 29, 1988.

OPINIONS BELOW

The opinion of the Court of Appeals for the Sixth Circuit is unreported and is reprinted in the appendix hereto ("App.") at 1a. The opinion of the District Court for the Eastern District of Kentucky (Reed, J.) is unreported and is reprinted at App. 12a.

JURISDICTION

Petitioner initiated this diversity action against respondent on October 20, 1983. The District Court entered summary judgment in favor of respondent on June 30, 1987, App. 19a, and petitioner appealed. The

Court of Appeals affirmed on June 29, 1988, and denied rehearing on August 17, 1988. App. 10a.[1] The jurisdiction of this Court to review the judgment of the Sixth Circuit is invoked under 28 U.S.C. § 1254(1).

PERTINENT FEDERAL RULE

Federal Rule of Civil Procedure 30(f)(1) provides, in pertinent part:

> (f) Certification and Filing by Officer; Exhibits; Copies; Notice of Filing. (1) The officer shall certify on the deposition that the witness was duly sworn by the officer and that the deposition is a true record of the testimony given by the witness. Unless otherwise ordered by the court, the officer shall then securely seal the deposition in an envelope indorsed with the title of the action and marked "Deposition of [here insert name of witness]" and shall promptly file it with the court in which the action is pending or send it by registered or certified mail to the clerk thereof for filing.

STATEMENT OF THE CASE

Petitioner Eugene McDowell ("McDowell") had his leg amputated while unloading corn from a wagon into an old house being used for grain storage. The wagon was designed to be used with a grain elevator during unloading operations, and was connected to an elevator manufactured by respondent Dynamics Corporation of America ("Dynamics"). The elevator—like much farm machinery—was designed to be powered by hooking it to the power take-off of a farm tractor. The elevator was connected to the tractor by a power take-off shaft, also

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[1] Petitioner had filed a "petition for rehearing *en banc*," and the Court of Appeals treated it as both a petition for rehearing before the original panel and a suggestion for rehearing *en banc*. A letter from the Clerk of this Court dated September 13, 1988, confirmed that the time to petition for certiorari began running on the date of the Sixth Circuit's August 17 order.

manufactured by Dynamics. The power take-off shaft ran from the tractor to a universal joint on the elevator.

When Dynamics designed and manufactured the power take-off shaft and elevator, it placed no guard over either the shaft or the universal joint. When it sold the products, it included no warnings to apprise consumers of the dangers of the shaft or the exposed joint. McDowell —who was not an experienced agricultural laborer but was instead helping friends—lost his leg when his clothing became entangled in the exposed universal joint connecting the power take-off shaft to the elevator.

On October 20, 1983, McDowell filed a products liability suit against Dynamics in the United States District Court for the Eastern District of Kentucky, with jurisdiction based on diversity. Ct. App. J.A. 8. The complaint alleged that the Dynamics machinery was inherently dangerous, that it was defectively designed, and that its design, manufacture, and testing did not conform to generally recognized and prevailing standards. The complaint also alleged that Dynamics knew or should have known of these defects, but failed to issue any warnings alerting those using the machinery to the dangers of doing so. The complaint concluded that the unsafe condition of the Dynamics machinery was the direct and proximate cause of the severe and irreversible injuries sustained by McDowell. *Id.* at 8-18. Dynamics answered, contending that it was not liable for McDowell's injuries because the machinery had been substantially altered and modified subsequent to its manufacture and sale. *Id.* at 19, 21.

The case then progressed much as any typical federal civil litigation. Defendant Dynamics noticed and took the deposition of plaintiff McDowell, which was filed with the District Court. There were the typical interrogatories and requests for production of documents, and Dynamics joined several third-party defendants. After a status report the trial court set a deadline for sum-

mary judgment motions, and Dynamics filed such a motion on December 3, 1986. In response, McDowell filed a memorandum in opposition and a motion to compel production of documents, arguing that the refusal of Dynamics to produce certain documents on the alteration issue prevented the plaintiff from "supply[ing] the requested information to its expert witness so that that expert witness can be presented for a discovery deposition." *Id.* at 78.

The District Court agreed. In an opinion filed February 25, 1987, the court denied the corporation's motion for summary judgment, concluding that "discovery should be completed before any motion for summary judgment may be appropriate." App. 22a. The court granted McDowell's motion to compel, App. 23a, and set a trial date. Ct. App. J.A. 65.

Dynamics complied with the production order, and counsel for McDowell was able to furnish his expert witness—John E. Sevart—with the pertinent documents. Dynamics then noticed the deposition of Sevart for May 15, 1987. At the April 24 pretrial conference, however, counsel for Dynamics orally requested that the court "reconsider" its denial of summary judgment. App. 27a. Counsel for McDowell alerted the court that the expert's deposition had not yet been taken, noting that "it's very important to allow that deposition to be taken before the motion for summary judgment." App. 28a. The court stated: "Well I think maybe that's true." App. 28a. The court did not refer again to the request for reconsideration of summary judgment, stating instead that "we'll try to get everything in shape to try the case on the date assigned" and "let's not do anything that will slow up the trial date if we can possibly avoid it. I'll look forward to seeing you on May the 26th." App. 29a-30a.

Also on April 24, pursuant to court order, counsel for McDowell filed his witness and exhibit list. That filing

confirmed that Sevart would be called as an expert and that "Sevart's deposition is scheduled to be taken in Wichita, Kansas, on May 15, 1987." The filing noted that Sevart was expected to testify that "[t]he design defect as well as the defect in the warning were present in the machine when it left the control of the manufacturer." Ct. App. J.A. 60-61.

On May 15 the deposition of the expert Sevart went forward as scheduled. In his deposition Sevart concluded that the design of the Dynamics machinery *was* defective and in violation of engineering standards. Sevart also testified that the alteration relied upon by the corporation was a "very minor" factor in terms of any injury, and that in any event a design permitting such an alteration was itself a dangerous defect. *Id.* at 25-31.

Contrary to the requirement of Rule 30(f)(1) that the reporter "*shall* promptly file [the deposition] with the court in which the action is pending or send it by registered or certified mail to the clerk thereof for filing," Fed. R. Civ. P. 30(f)(1) (emphasis supplied), the reporter did neither with the Sevart deposition. Instead, she sent the original to counsel for the corporation, who had noticed the deposition. That counsel also failed to file it with the court.

Meanwhile, the District Court twice continued the trial date, for extraneous scheduling reasons. *See* Ct. App. J.A. 67. The latest announced date conflicted with the schedules of counsel for all parties, so on June 24 they filed a joint motion for a new trial date. Six days later, however, the District Court filed an opinion granting summary judgment in favor of Dynamics. App. 12a. The court concluded that "[t]here is unrefuted evidence of record that the product in question had been substantially modified and altered." App. 15a. In particular, the court relied upon an affidavit of a corporation official, who stated that the "alteration to the original equipment * * * caused the injury." App. 16a. This assertion,

of course, was directly refuted by Sevart's expert testimony, which created a genuine issue of material fact that should have precluded summary judgment. Fed. R. Civ. P. 56(c). Unbeknownst to counsel for McDowell, however, that testimony was in fact not before the District Court, because of the reporter's failure to comply with Rule 30(f)(1).

In light of the clear existence of genuine issues of material fact, counsel for McDowell filed a notice of appeal to the Sixth Circuit. In preparing his brief, counsel naturally relied heavily on Sevart's deposition. When it came time to file the Joint Appendix with the Court of Appeals, counsel first became aware that the reporter had failed to comply with Rule 30(f)(1), and that counsel for Dynamics—to whom the reporter had sent the original of the deposition—had also failed to file it.[2] Petitioner thereupon moved in the District Court for leave to file the deposition, which the District Court granted without objection on October 5, 1987.

On June 29, 1988, the Sixth Circuit affirmed the District Court's grant of summary judgment. The Court of Appeals implicitly recognized that the Sevart deposition created a genuine issue of material fact,[3] but held that petitioner could not rely upon that testimony because it was not filed at the time the District Court rendered its decision. App. 2a. The Court of Appeals also held that it lacked the power to consider the deposition, concluding that it "cannot take into account [o]n appeal for the first time evidence not submitted to the district court." App. 2a. The court expressly acknowledged that "some courts have softened this rule to allow depositions relied

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[2] *See* Affidavit of William R. Garmer, Esq., addendum to Reply Brief for the Plaintiff-Appellant before the Court of Appeals.

[3] *See* App. 2a ("*Without the deposition testimony*, plaintiff has presented no evidence of design defect in response to defendant's proof") (emphasis supplied).

upon by a party before the district court but for some reason never filed to be considered by the court of appeals," App. 6a-7a (citing cases from the Fifth and Eleventh Circuits), but ruled that this exception was not available here because "the district court never in any fashion considered the evidence sought now to be relied upon." App. 7a. The court stated that "we can sympathize with plaintiff's position," App. 8a, but nonetheless affirmed the grant of summary judgment.

REASONS FOR GRANTING THE WRIT

The court below denied McDowell his day in court because of the failure of a court reporter to follow the Federal Rules, and because the court had a mistaken view of the limits on its own power to consider the deposition that the reporter should have filed. Dynamics does not dispute that summary judgment could not have been granted in the face of the Sevart deposition,[4] and, as noted, the court below implicitly recognized that the deposition created a genuine issue of material fact. Note 3 *supra*. The court's decision nonetheless to uphold summary judgment because the deposition was not before the District Court is not simply a matter of grave injustice to McDowell but of broader significance, because it conflicts with decisions from other Circuits on Rule 30(f)(1) and on the inherent power of Courts of Appeal to consider evidence not presented to trial courts. These conflicts are particularly troubling because they involve recurring questions of federal procedure. This Court should grant the writ to resolve these recurring conflicts and ensure uniformity in the rules applied in the federal courts.

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[4] The corporation's brief on appeal was devoted exclusively to arguing that the deposition could not be considered; it never suggested that summary judgment would be proper even if the deposition had been before the District Court, as it should have been under Fed. R. Civ. P. 30(f)(1).

I. The Decision Below Conflicts with Decisions from Other Courts of Appeal in Penalizing a Party for a Reporter's Failure to Follow Rule 30(f)(1)

The language of Rule 30(f)(1) is unambiguous. The officer before whom a deposition is taken must certify that the witness was duly sworn and that the deposition is a true record of the witness's testimony. The officer must then securely seal the deposition in an envelope, "and *shall* promptly file it with the court in which the action is pending or send it by registered or certified mail to the clerk thereof for filing." Fed. R. Civ. P. 30(f)(1) (emphasis supplied).[5]

Other courts have recognized that the Rule means what it says, and that it imposes a mandatory obligation upon the reporter before whom a deposition is taken to file the deposition with the trial court. *See, e.g., In re Reporters Comm. for Freedom of the Press*, 773 F.2d 1325, 1338 (D.C. Cir. 1985) ("The current Federal Rules require deposition transcripts to be filed * * *") (Scalia, J.); *Tavoulareas* v. *Washington Post Co.*, 724 F.2d 1010, 1015 (D.C. Cir.) ("Rule 30(f)(1) requires that depositions be 'promptly file[d] * * * with the court in which the action is pending' unless otherwise ordered by the court"), *vacated on other grounds*, 737 F.2d 1170 (D.C. Cir. 1984) (en banc). Courts have ordered reporters to comply with the Rule and file depositions when they have neglected to do so. *See, e.g., Kinan* v. *City of Brockton*, 112 F.R.D. 206, 208 (D. Mass. 1986). ("The provisions of Rule 30(f) are mandatory. The original deposition *must* be filed in Court unless the Court orders otherwise") (emphasis in original).

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[5] *See also* Advisory Committee Note to Fed. R. Civ. P. 5(d) ("By the terms of * * * Rule 30(f)(1) discovery material *must* be promptly filed") (emphasis supplied). The same requirement applies to depositions upon written questions pursuant to Fed. R. Civ. P. 31(b) (officer "shall proceed promptly * * * to take the testimony of the witness in response to the questions and to prepare, certify, *and file or mail* the deposition") (emphasis supplied).

The facts of *C.P.C. Partnership Bardot Plastics, Inc.* v. *P.T.R., Inc.*, 96 F.R.D. 184 (E.D. Pa. 1982), are quite similar to those of the instant case. There, the reporter —like the reporter here—failed to file a deposition as required by Rule 30(f)(1). Instead, the reporter—again, as in this case—gave the original to counsel for one of the parties, who did not file it. The court ordered the deposition filed, stressing that "the language of the Rule makes it the duty of the reporter taking the deposition to file it," and concluding that local practice to the contrary could not vary the express terms of the Rule. 96 F.R.D. at 185.[6]

Given the explicit language of the Rule, and the consistent interpretation of the Rule by the courts, McDowell was entitled to rely upon the reporter filing the deposition and making it part of the record before the District Court. The court below erred in penalizing him for the reporter's failure to do so. Its decision conflicts with decisions from other Circuits, which have permitted parties to rely upon depositions that were not but should have been filed. In *Ross* v. *Kemp*, 785 F.2d 1467 (11th Cir.

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[6] Amendments to the Rules adopted in 1980 authorized District Courts, by order, to dispense with the requirement that discovery material—including depositions—be automatically filed, *see* Fed. R. Civ. P. 5(d), and the filing requirement of 30(f)(1) thus applies "[u]nless otherwise ordered by the court." The court in this case issued a Local Rule eliminating the automatic filing requirement for interrogatories, requests for production, and requests for admissions, *but not for depositions*. Local Rule 8(a). Just over half of the districts have eliminated the automatic filing requirement. The varying practices have resulted in considerable confusion, and will doubtless generate many cases similar to the one at bar. When the 1980 amendments were being considered, one bar committee warned that eliminating automatic filing "very probably would cause, and, ultimately, result in disputes requiring resolution by the court as to what is in 'the file.'" Report of the Ad Hoc Committee to Study the High Cost of Litigation to the Seventh Circuit Judicial Committee and the Bar Association of the Seventh Federal Circuit, 86 F.R.D. 267, 284 (1979).

1986), for example, a party assumed that a critical deposition "would be automatically filed with the district court pursuant to Fed. R. Civ. P. 30(f)(1)" but it was not, a fact that did not become apparent until after appeal. The appellate court nonetheless permitted the party to rely upon the deposition, noting that the Federal Rules "provided for automatic filing of depositions with the court by the officer before whom the deposition was taken" and that it was therefore "reasonable to believe that the * * * deposition had been filed with the court." *Id.* at 1471.

The Fifth Circuit follows the same approach. In *McDaniel* v. *Travelers Insurance Co.*, 494 F.2d 1189, 1190 (5th Cir. 1974), the plaintiff's own deposition "was not filed with the court below by either the defendants, at whose instance the deposition was taken, or by the certifying officer, whose responsibility it was to file it. *See* Rule 30(f)(1)." The appellate court nonetheless did not ignore the deposition—like the court below—but considered it in reviewing a grant of summary judgment.[7]

According to the court below, the *Ross* and *McDaniel* cases are inapplicable because McDowell did not rely upon the deposition below or bring it to the attention of the trial court. *See* App. 7a. The record demonstrates, however, that:

- McDowell opposed sumary judgment on the ground that he needed the Sevart deposition to show genuine issues of material fact. App. 22a-23a, 28a.

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[7] Courts have also recognized in other contexts that a party should not lose rights due to the failure of court officers to follow the Federal Rules. *See, e.g., Romandette* v. *Weetabix Co.*, 807 F.2d 309 (2d Cir. 1986) (party should not be penalized for marshal's failure properly to serve defendant under Fed. R. Civ. P. 4); *Owens-El* v. *United States Attorney Gen.*, 759 F.2d 349, 350 (4th Cir. 1985) (Clerk's office employee returned complaint to plaintiff, wrongly directing him to proceed under Section 1983 rather than Federal Tort Claims Act; court reinstated original claim, finding "no need to visit the consequence of the Clerk's error upon the plaintiff"). The approach of the court below conflicts with that of the Second and Fourth Circuits in these cases.

- The District Court agreed that "discovery should be completed before any motion for summary judgment may be appropriate." App. 22a.
- The District Court initially did not grant the orally renewed motion for summary judgment, agreeing that the Sevart deposition was important. App. 28a.
- McDowell alerted the District Court to his reliance on the Sevart deposition in his witness list, filed with the court. *See supra* at 4-5.

McDowell thus clearly relied upon the deposition before the District Court, and alerted the District Court to the significance of the deposition. The District Court was, in any event, " 'obligated to search the record and independently determine whether or not a genuine issue of fact exists.' " *Jiminez* v. *Dreis & Krump Mfg. Co.*, 736 F.2d 51, 53 (2d Cir. 1984) (quoting *Higgins* v. *Baker*, 309 F. Supp. 635 (S.D.N.Y. 1970)).[8] The court granted summary judgment only because the critical deposition was not in the record. It was missing not through any fault of McDowell but because the reporter failed to obey the Federal Rules.[9]

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[8] *Accord Gomez* v. *City of Sheridan*, 611 F. Supp. 230, 235 n.2 (D. Col. 1985) ("I am obligated to search the record and determine independently whether a genuine issue of fact exists"); *Ballard* v. *Woodard*, 641 F. Supp. 432, 434 (W.D.N.C. 1986); *Reittinger* v. *American Can Co.*, 574 F. Supp. 306, 312 (M.D. Pa. 1983).

[9] The purported distinction adopted by the court below is invalid for another reason. Whether a party can rely on a deposition not filed cannot turn on whether the deposition was cited in a brief or memorandum before the District Court. *See United States* v. *Gazda*, 499 F.2d 161, 164 (3d Cir. 1974) ("It is a settled principle that statements made by counsel in briefs are not part of the record"). *Cf. Bender* v. *Williamsport Area School Dist.*, 475 U.S. 534, 547 (1986) ("the necessary factual predicate may not be gleaned from the briefs and arguments themselves"); *Lynch* v. *New York*, 293 U.S. 52, 54 (1934) ("Nor can claim of jurisdiction be sustained by reference to briefs and statements which are not part of the record").

The entry of summary judgment against McDowell on this basis was fundamentally unfair. Just recently, this Court emphasized the importance of notice to the opposing party before a grant of summary judgment. *Celotex Corp.* v. *Catrett*, 477 U.S. 317, 326 (1986). Here, the trial court had agreed with counsel for McDowell on two separate occasions that Sevart's deposition should be taken before consideration of summary judgment, App. 22a, 28a, so McDowell was fully justified in concluding that judgment would not be entered without consideration of that deposition. Yet that is precisely what happened, because of the reporter's—not McDowell's—violation of the Rules.

Justice White wrote separately in *Celotex*, providing the fifth vote for the majority. Justice White's concurring opinion addressed a hypothetical that corresponds precisely to what happened in this case:

> Petitioner Celotex does not dispute that if respondent has named a witness to support her claim, summary judgment should not be granted without Celotex somehow showing that the named witness' possible testimony raises no genuine issue of material fact. [*Id.* at 328.]

Here, McDowell *did* name a witness to support his claim—in his opposition to Dynamics' written motion, in his response to Dynamics' oral motion, and, above all, in his witness list. The court nonetheless granted summary judgment even though Dynamics did *not* "show[] that the named witness' possible testimony raises no genuine issue of material fact." Dynamics could not make such a showing because it knew that the witness' *actual* deposition testimony clearly raised genuine issues of material fact. McDowell fully discharged his burden under Justice White's understanding of *Celotex*—which must be regarded as controlling, *see Marks* v. *United States*, 430 U.S. 188, 193 (1977)—and the decision below upholding

summary judgment thus conflicts not only with *Ross* and *McDaniel* but with *Celotex* as well.

Permitting the right of an individual to his day in court to turn on a third party's failure to follow the Rules would constitute, in the adversary system, an invitation to sharp practice. Here, neither the reporter nor opposing counsel—who took the deposition—filed it with the court. Rewarding such a circumstance with a victory for opposing counsel can only encourage gamesmanship over the record, to the detriment of the fair and efficient conduct of litigation.

II. There is a Sharp Conflict in the Circuits over Whether a Court of Appeals Has Inherent Power to Consider Evidence Not Presented to the District Court

The court below ruled that it was wholly without power to consider the Sevart deposition, because that deposition was not submitted to the District Court. The Sixth Circuit stated that "we can sympathize with plaintiff's position," but concluded that "we cannot take into account [o]n appeal for the first time evidence not submitted to the district court." App. 2a, 8a.

The Circuits are sharply divided on this question. Decisions from the Third, Fifth, Seventh, and Tenth Circuits appear to support the decision below, holding that federal appellate courts lack any authority to consider evidence for the first time on appeal. Decisions from the District of Columbia, Second, Eighth, and Eleventh Circuits, however, squarely hold the opposite, recognizing an appellate court's authority in appropriate circumstances to consider on appeal material not previously submitted to the District Court. This Court should grant the writ to resolve this well-developed conflict on an important question of procedure in the federal courts.

The Third Circuit was presented with the issue in *Fassett* v. *Delta Kappa Epsilon*, 807 F.2d 1150 (3d Cir.

1986), *cert. denied*, 107 S. Ct. 2463 (1987). In that case the District Court, after rendering the final judgment, granted a motion by appellants to augment the record on appeal with a deposition that was not filed at the time the District Court issued its decision. The Court of Appeals held that the District Court had no authority to expand the record on appeal and that "[s]imilarly, this court could not, on its own motion, accept these records into evidence. The only proper function of a court of appeals is to review the decision below on the basis of the record that was before the district court." *Id.* at 1165 (footnote omitted).

The Seventh Circuit is of the same view. In *Busse* v. *United States*, 542 F.2d 421, 427-428 (7th Cir. 1976), the court held that depositions not filed until after the notice of appeal "cannot be considered on appeal, because they were not before the District Court at the time of its ruling." The court reaffirmed this view more recently, holding that "[t]he parties may rely on appeal only on materials furnished to the district judge." *Henn* v. *National Geographic Soc'y*, 819 F.2d 824, 831 (7th Cir.), *cert. denied*, 108 S. Ct. 454 (1987). *See also Republic Steel Corp.* v. *Pennsylvania Engineering Corp.*, 785 F.2d 174, 179 n.6 (7th Cir. 1986).

The Fifth Circuit also agrees with the court below. It is willing to consider evidence that was presented to the District Court—even though not properly filed—but disclaims any power to consider evidence never presented to the trial court. *See Leonard* v. *Dixie Well Serv. & Supply, Inc.*, 828 F.2d 291, 296 (5th Cir. 1987); *Waguespack* v. *Aetna Life & Casualty Co.*, 795 F.2d 523, 525 (5th Cir. 1986), *cert. denied*, 107 S. Ct. 1309 (1987); *McDaniel* v. *Travelers Ins. Co.*, 494 F.2d at 1190. The Tenth Circuit will not even go that far, adhering to the view that an appellate court "may not properly consider depositions not filed in the district court in determining an appeal," even when the depositions were called to the

trial judge's attention. *Daiflon, Inc.* v. *Allied Chem. Corp.*, 534 F.2d 221, 226-227 (10th Cir. 1976), *rev'd on other grounds*, 449 U.S. 33 (1980).

There is, however, a contrary line of authority, equally well developed. In *Dickerson* v. *Alabama*, 667 F.2d 1364 (11th Cir.), *cert. denied*, 459 U.S. 878 (1982), a party sought to rely on appeal on a transcript that was not part of the record below and was not submitted in any way to the District Court. The Court of Appeals agreed to consider the evidence, concluding that "[w]hile federal appellate courts do not often supplement the record on appeal with evidence not reviewed by the court below, *it is clear that the authority to do so exists.*" *Id.* at 1367 (emphasis supplied). Indeed, the court reversed on the strength of the transcript not previously submitted to the District Court. *Id.* at 1368.

In *Ross* v. *Kemp*, 785 F.2d at 1474, the court reaffirmed that it had "inherent equitable authority to enlarge the record and consider material that has not been considered by the court below." In that case the court remanded to the District Court for a hearing to determine the circumstances under which the material in question was excluded from the record below. *Id.* at 1477.[10] *See also First Alabama Bank* v. *Parsons Steel, Inc.* 825 F.2d 1475, 1487 (11th Cir. 1987) ("This Court has the discretionary power to supplement the record on appeal, even to include evidence not reviewed by the court below"), *cert. denied*, 108 S.Ct. 1015 (1988); *United States* v. *Bosby*, 675 F.2d 1174, 1181 n.9 (11th Cir. 1982) ("We have inherent equitable powers to permit parties to supplement the record on appeal").

The Eleventh Circuit in *Dickerson* and *Ross* cited cases from the Eighth, Second, and District of Columbia Cir-

[10] The court's ruling on its "inherent" power concerned evidence other than the unfiled deposition that was also at issue in that case. *See supra* at 9-10.

cuits in support of its conclusion, and indeed those Circuits do agree—contrary to the decision below—that there is "inherent power" in an appellate court to consider evidence not presented to the trial court. In *Turk* v. *United States*, 429 F.2d 1327 (8th Cir. 1970), the Court of Appeals reversed a conviction on the basis of testimony that was "not presented to the district court and was not otherwise made a part of the record on this appeal." The Eighth Circuit concluded that "in the interest of justice this court may order the record enlarged * * *." *Id.* at 1329. The District of Columbia Circuit reached a similar result in *Gatewood* v. *United States*, 209 F.2d 789 (D.C. Cir. 1953), ruling that "[a]ppellate consideration of the ultimate question in a case must not be frustrated by the parties' failure to include in the record preliminary proceedings which were in reality part of the trial process, and which might be found to be of vital significance." *Id.* at 792 (footnote omitted). The court made the transcript in question part of the record on its own motion "in the interest of * * * the due administration of justice." *Id.* at 792 n.5.

The Second Circuit permitted supplementation of the record on appeal in *United States* v. *Aulet*, 618 F.2d 182 (2d Cir. 1980), *cert. denied*, 469 U.S. 933 (1984). There, the court granted the *government's* motion to consider on appeal "3500 material" that had been provided to defendant's counsel below but never made a part of the trial court record or otherwise called to the attention of the trial court. The Court of Appeals failed to discern "what principle of law or equity would be served by our * * * shielding ourselves from the knowledge of what transpired below." 618 F.2d at 187. *See also National Nutritional Foods Ass'n* v. *FDA*, 491 F.2d 1141, 1144 (2d Cir.) (Friendly, J.) ("A reviewing court has inherent power to obtain evidence needed to enable it to decide a contention of this sort. * * * [T]he evidence desired could doubtless be obtained by deposition"), *cert. denied*, 419 U.S. 874 (1974).

Fully nine of the thirteen Circuits have now addressed this question, with the Third, Fifth, Seventh, Tenth, and now Sixth Circuits concluding that there is no power to consider on appeal evidence not presented to the District Court, and the District of Columbia, Second, Eighth, and Eleventh Circuits holding the exact opposite. The views of the different camps are unambiguous, and the conflict is well entrenched.

Indeed, even the leading commentators disagree. The Sixth Circuit relied on *Moore's Federal Practice* for the proposition that depositions not filed may not normally be considered on appeal—with an exception if the evidence was actually presented to the trial court, *see* App. 6a—but other leading authorities recognize that "[i]n special circumstances * * * a court of appeals may permit supplementation of the record to add material *not presented to the district court.*" 16 C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure: Jurisdiction and Related Matters* § 3956, at 436 (1988 Supp.) (emphasis supplied).

III. Review by this Court is Necessary to Ensure Uniform Procedures in the Federal Courts

There is perhaps no area of federal law in which the need for uniformity is as important as in the rules governing procedure in the thousands of suits filed in federal court each year. The Federal Rules themselves were intended to " 'bring about uniformity' " in the conduct of federal litigation, S. Rep. No. 1049, 73d Cong., 2d Sess. (1934) (quoting letter from Attorney General Homer Cummings), and that critical objective cannot be attained in the absence of resolution by this Court of conflicts that arise in the interpretation of the Rules.

As noted, the decision below conflicts with decisions from other Circuits on the significance of a reporter's failure to comply with Fed. R. Civ. P. 30(f)(1), and exacerbates an even more pronounced conflict on the au-

thority of a federal appellate court to consider evidence not submitted to a District Court. Although one would hope that cases would not arise with any frequency under Rule 30(f)(1), the discussion above indicates that the problem recurs with surprising regularity. In addition, the more general question of penalizing a party for the failure of an officer of the court to follow the Rules arises under a wide variety of provisions, and is not limited to Rule 30(f)(1). *See, e.g., supra* n.7.

In any event, it is clear that the question of the inherent power of a Court of Appeals to consider evidence not submitted to a District Court demands resolution by this Court. The question recurs sufficiently to have resulted in definitive rulings by nine Circuits thus far. Such a basic procedural issue concerning relations between the trial and appellate courts should not be subject to differing rules in the federal system.

Since the issue is the "inherent power" of the appellate courts, it can be definitively resolved only by this Court. The nearly even split among the Circuits ensures that the conflict will not dissipate; this is not a situation in which one or two wayward Circuits can be expected to come into line over time. Nor should the conflict be permitted to "percolate" further—the arguments on both sides have been fully aired in the reported cases, and the issue is ripe for resolution. Finally, this case presents an ideal vehicle for resolving the conflict, because there is no question that the court below based its decision on its assumed inability to consider the critical deposition. App. 2a, 8a. This Court should grant the writ to ensure uniformity of procedure in the handling of appeals throughout the federal judicial system.

CONCLUSION

For the foregoing reasons, this Court should grant the writ and reverse the decision below.

Respectfully submitted,

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APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 87-5794

EUGENE MCDOWELL,
Plaintiff-Appellant,

v.

DYNAMICS CORPORATION OF AMERICA,
Defendant-Appellee,

HAROLD JOHNSON and DANNY EUGENE TOWLES,
Third Party Defendants.

On Appeal from the United States District Court
for the Eastern District of Kentucky

Decided and Filed June 29, 1988

BEFORE: WELLFORD and NORRIS, Circuit Judges; and COOK*, District Judge.

PER CURIAM. Plaintiff Eugene McDowell seeks reversal of the district court's grant of summary judgment to defendant Dynamics Corporation of America ("DCA").

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* The Honorable Julian A. Cook, Jr., United States District Judge for the Eastern District of Michigan, sitting by designation.

Unfortunately for the plaintiff, the deposition testimony upon which he seeks to rely on appeal to demonstrate a genuine issue of material fact was neither filed at the time the district court rendered its judgment, nor was it presented to the district court in any form. Plaintiff's counsel relied upon Fed. R. Civ. P. 30(f)(1) and believed that pursuant thereto the depositions taken by the defendant would be filed by the court reporter. He had the responsibility to ensure that his evidence was before the district court in a timely fashion or, in a timely fashion, to seek some relief from the district court's grant of summary judgment. Without the deposition testimony, plaintiff has presented no evidence of design defect in response to defendant's proof in respect to this product liability claim filed in the district court based on diversity jurisdiction. Consequently, Ky. Rev. Stat. Ann. 411.310(1) (Michie/Bobbs-Merrill Supp. 1986) dictates judgment for defendant, and we affirm the decision of the district court, because we cannot take into account an appeal for the first time evidence not submitted to the district court.

Plaintiff was seriously injured while assisting in the unloading of corn from a wagon into an old house used for grain storage. His clothing was caught in the power take-off shaft connecting a tractor to the corn elevator. Both the shaft in question and the corn elevator were manufactured by DCA. Plaintiff's left leg was amputated as the result of the accident, which occurred on October 22, 1982. Plaintiff filed suit against DCA, alleging defective design and failure to warn nearly a year later. DCA answered, alleging, among other things, that plaintiff was contributorily negligent and invoking the presumptions accorded it under Ky. Rev. Stat. Ann. §§ 411.310 and 411.320 (Michie/Bobbs-Merrill Supp. 1986). Those statutory provisions, part of Kentucky's Products Liability Act, provide:

> 411.310. Presumptions in product liability actions. —(1) In any product liability action, *it shall be pre-*

sumed, until rebutted by a preponderance of the evidence to the contrary, that the subject product was not defective if the injury, death or property damage occurred either more than five (5) years after the date of sale to the first consumer or more than eight (8) years after the date of manufacture.

(Emphasis added).

411.320. Circumstances under which defendant is liable.—(1) In any product liability action, a manufacturer shall be liable only for the personal injury, death or property damage that would have occurred *if the product had been used in its original, unaltered and unmodified condition.* For the purpose of this section, product alteration or modification shall include failure to observe routine care and maintenance, but shall not include ordinary wear and tear. *This section shall apply to alterations or modifications made by any person or entity,* except those made in accordance with specifications or instructions furnished by the manufacturer.

(2) In any product liability action, if the plaintiff performed an unauthorized alteration or an unauthorized modification, and such alteration or modification was a substantial cause of the occurrence that caused injury or damage to the plaintiff, the defendant shall not be liable whether or not said defendant was at fault or the product was defective.

(3) In any product liability action, if the plaintiff failed to exercise ordinary care in the circumstances in his use of the product, and such failure was a substantial cause of the occurrence that cause injury or damage to the plaintiff, the defendant shall not be liable whether or not said defendant was at fault or the product was defective.

(Emphasis added).

Following some discovery, the district court entered an order on September 4, 1986, requiring that discovery be completed within the sixty days and that motions for summary judgment be filed within ninety days of the date of the order. On December 3, 1986, more than three years after the complaint had been filed, DCA filed its motion for summary judgment, stating as grounds plaintiff's contributory negligence and asserting its nonliability under Ky. Rev. Stat. Ann. § 411.320(1) due to alterations in the machinery in dispute. Plaintiff responded, denying that DCA was entitled to judgment as a matter of law on either of the asserted grounds. He recited evidence of his lack of knowledge of the workings of the elevator or shaft, and argued that even if the shaft had been modified, DCA had failed to present evidence to show that it was the modification that caused the tragic accident. Finally, plaintiff asserted that he had not received all the discovery to which he was entitled under a motion to compel production. In reply, defendant denied that proof of its causation between the modification and the injury was necessary, and filed the affidavit of Robert F. Thayer ("Thayer"), its manager, attesting to the manufacture and sale of the elevator between August, 1967 and May, 1968, and to the modifications made to the machine since the manufacture.

A hearing was conducted on the two motions on February 18, 1987, and a pretrial conference scheduled for April 24, 1987, with trial to begin May 26, 1987. The district court at first denied defendant's motion for summary judgment.

Plaintiff filed a witness and exhibit list on April 24, 1987; included in his witness list were John Sevart, a professional engineer, H. Bradley Hammond, a college professor of design, and Harold Johnson, the owner of the elevator. Sevart's expected expert testimony pertained to defective design of the corn elevator, the inadequacy of DCA's warnings, and the causal connection

between the asserted defect and plaintiff's injuries. The witness list noted that Sevart's deposition was scheduled for May 15, 1987.

At the pretrial conference, DCA again renewed its motion for summary judgment, and it was taken under advisement. Within the next six weeks, the trial date was continued twice and the deposition transcripts of plaintiff's doctor, and one Elmer G. Henninger were filed. Plaintiff's own deposition had been previously filed. None of the depositions of plaintiff's experts were filed before June 30, 1987, when the district court entered summary judgment in favor of DCA. On that same day, two additional transcripts of depositions taken on plaintiff's behalf prior to June 30 were filed. Between April 27, 1987 and June 30, 1987, plaintiff had filed no additional memorandum of law or brief in opposition to defendant's renewed motion for summary judgment. The depositions of the experts were not forwarded by the court reporter to the court, although copies were made available to counsel.

The district court referred to the Thayer affidavit in concluding that DCA was entitled to the statutory presumptions in its favor which plaintiff had failed to rebut on the record before the district court. The district court based this conclusion on the proof regarding the date of the elevator's manufacture and its subsequent alteration. The district court also discounted as "academic" the question of causation under § 411.320(1), concluding that it was impossible to determine what injury, if any, appellant would have received if the machine had been used in its original, unaltered and unmodified condition.

On July 1, 1987, the deposition transcripts of three witnesses, including Johnson, the owner, were filed with the district court.[1] Plaintiff filed its notice of appeal to

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[1] The depositions of these three individuals had apparently been taken on June 16, 1987, but had not been filed.

this court on July 11, 1987. It was not until September and October that transcripts of depositions of plaintiff's experts were filed. The Sevart deposition was filed with the district court pursuant to a motion by plaintiff to allow it to be filed and the district court order granted this motion, but made no attempt to reconsider its prior judgment.

On appeal, plaintiff relies on the deposition testimony of witnesses not timely filed with the district court in his efforts to demonstrate genuine issues of material fact which preclude summary judgment. In response, defendant insists that because these deposition transcripts were not before the district court when it granted summary judgment, they cannot now be considered by this court on appeal.

Had the plaintiff affirmatively utilized the depositions filed after the grant of summary judgment, there is precedent to consider them despite their late filing proper under Fed. R. App. P. 10(e).

Although "[a] deposition not filed in accordance with [Fed. R. Civ. P.] 30(f) may not normally be considered on appeal,"[2] 4A Moore's Federal Practice § 30.63[3], some courts have softened this rule to allow depositions relied upon by a party before the district court but for some reason never filed to be considered by the court of

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[2] Fed. R. Civ. P. 30(f) governs the filing of depositions taken upon oral examination and provides in pertinent part:

> (f) Certification and Filing by Officer; Exhibits; Copies; Notice of Filing. (1) The officer shall certify on the deposition that the witness was duly sworn by the officer and that the deposition is a true record of the testimony given by the witness. Unless otherwise ordered by the court, the officer shall then securely seal the deposition in an envelope indorsed with the title of the action and marked "Deposition of [here insert name of witness]" and shall promptly file it with the court in which the action is pending or send it by registered or certified mail to the clerk thereof for filing.

appeals. In *McDaniel v. Travelers Ins. Co.*, 494 F.2d 1189, 1190 (5th Cir. 1974), the court allowed plaintiff to supplement the record on appeal to include his deposition which he had relied upon below in resisting summary judgment, assuming it would be filed pursuant to Rule 30(f)(1) by "either the defendants, at whose instance the deposition was taken, or by the certifying officer, whose responsibility it was to file it." *See also Ross v. Kemp*, 785 F.2d 1467 (11th Cir. 1986). This practice is consistent with Fed. R. App. P. 10(e), which allows correction or modification of the record to conform to what actually occurred in the district court if some material matter is omitted by error or accident.

Rule 10(e), however, cannot save plaintiff where the district court never in any fashion considered the evidence sought now to be relied upon, despite the plaintiff's contentions that the depositions were not timely filed due to error by the DCA's counsel or the certifying officer.[3] *See S & E Shipping Corp. v. Chesapeake & Oregon Ry. Co.*, 678 F.2d 636, 641 (6th Cir. 1982) (purpose of Fed. R. App. P. 10(e) is to allow district court to correct omission from or misstatements in the record for appeal, not to introduce new evidence in the court of appeals).

The present case does not involve a situation where the depositions, although not filed, were relied upon in briefs or oral argument before the district court in resisting the Rule 56 motion, or in a motion for reconsideration. The depositions appellant seeks to rely on were not filed before the district court ruled on appellee's motion, nor were they relied upon in briefs or oral argument below. In two instances the depositions in question were filed after the notice of appeal was filed.

Plaintiff argues that he did "rely" on the depositions before the district court to the extent that he believed

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[3] The district court does not state any basis for its order allowing appellant to file the Sevart deposition.

they would be filed pursuant to 30(f)(1) and would demonstrate, upon consideration, genuine issues of material fact. Unfortunately, he filed no pleading to offer the district court guidance in this regard, or an opportunity to take this evidence into account. The issue then is whether plaintiff's counsel's reliance that Rule 30(f)(1) would be complied with, given the other facts of this case, is sufficient to justify reconsideration of defendant's Rule 56 motion taking into account the depositions in question.[4]

Plaintiff argues that the case was being readied for trial during the summer of 1987, and that it was readily apparent to both sides that the discovery conducted after the pretrial conference of April 24 was to be taken into account, but before June 30, 1987. Plaintiff further asserts that it is unfair for defendant to benefit from the failure to file the depositions in accordance with Rule 30(f)(1) when defendant was fully aware that the depositions demonstrated a material issue in genuine dispute. McDowell's counsel appends his own affidavit to the reply brief attesting to his discovery after the notice of appeal was filed that the Sevart deposition had been corrected and mailed to DCA's counsel and remained in his files.

While we can sympathize with plaintiff's position, we cannot conclude that the district court was in error in its Rule 56 ruling for the defendant. It is for the party opposing such a motion to bring to the attention of the

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[4] Plaintiff also argues that even without the four depositions, summary judgment was improper. He contends first that the Thayer affidavit is rebutted by, or is inconsistent with, Thayer's deposition testimony. He points to only one such instance which relates to the issue of modification. The opinions and statements in the Thayer affidavit regarding defective design and date of manufacture do not contradict the Thayer deposition and § 411.310(1) still governs. The witness list and summary of anticipated evidence does not constitute evidence in response to defendant's motion for summary judgment.

district court those relevant materials upon which he seeks to rely. Neither by motion nor by a petition for reconsideration did plaintiff's counsel advise the district court of the contents of the late filed affidavits and seek reconsideration. Regardless of whether or not the parties had knowledge of the contents of the depositions in dispute and their alleged evidentiary value, the judge must be advised or informed when a summary judgment motion is outstanding as to responsive materials relied upon. The judgment here was granted more than three years after the plaintiff had filed his complaint.

Under the circumstances, we find no error in the action of the district court and accordingly AFFIRM its judgment.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 87-5794

EUGENE MCDOWELL,
Plaintiff-Appellant.

v.

DYNAMICS CORPORATION OF AMERICA,
Defendant-Appellee,

v.

HAROLD JOHNSON and DANNY TOWLES,
Third Party Defendants-Appellees

[Filed Aug. 17, 1988]

ORDER

BEFORE: WELLFORD and NORRIS, Circuit Judges and COOK*, United States District Judge

The Court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this Court, and no judge of this Court having requested a vote on the suggestion for rehearing en banc,

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* Hon. Julian A. Cook, Jr. sitting by designation from the Eastern District of Michigan.

the petition for rehearing has been referred to the original hearing panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green
LEONARD GREEN
Clerk

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
LEXINGTON

Civil Action No. 83-329

EUGENE MCDOWELL,
Plaintiff,

vs.

DYNAMICS CORPORATION OF AMERICA,
Defendant,

vs.

HAROLD JOHNSON and DANNY EUGENE TOWLES,
Third-Party Defendants.

[Filed June 30, 1987]

MEMORANDUM OPINION

* * * *

The record reflects that at the pre-trial conference held on April 24, 1987, the defendant Dynamics Corporation of America renewed its motion for summary judgment pursuant to FRCP 56. Additionally, the third-party defendants have moved the court to dismiss the third-party complaint against them. Furthermore, the parties have filed a joint motion for a hearing for the purpose of rescheduling the present trial date of August 24, 1987, on the grounds that counsel for all parties have conflicts

on that date. This memorandum opinion will address all pending motions.

This is a products liability/personal injury action stemming from an injury plaintiff sustained on October 22, 1982, while he was operating a "Little Giant" portable elevator conveyor owned by his brother-in-law, third-party defendant Harold Johnson. Plaintiff and Harold Johnson were working for third-party defendant Danny Towles on Towles' property at the time of the accident.

It seems that plaintiff's injury occurred because his pant leg became entwined in the moving parts of the conveyor, resulting in an injury to plaintiff's left leg which ultimately had to be amputated above the knee.

Plaintiff's theory of recovery against defendant Dynamics Corporation of America seems to be based on (1) a breach of duty by the manufacturer to make a reasonably safe product, and (2) a breach of implied warranty because the product was not fit for the purpose for which it was intended.

The defendant manufacturer filed its third-party complaint against Harold Johnson and Danny Towles for indemnification, alleging that plaintiff's injury was caused by their negligence.

In support of its motion for summary judgment, defendant Dynamics Corporation of America presents a two-pronged argument. First of all it relies on *Reda Pump Company v. Finck*, Ky., 713 S.W.2d 818 (1986) and K.R.S. 411.320(3) for the proposition that plaintiff is barred from recovery because he was contributorily negligent and that such negligence substantially contributed to his injuries.

The second prong of its argument is based on the fact that the "Little Giant" portable conveyor which injured

plaintiff had been substantially altered and modified subsequent to its date of manufacture. Dynamics Corporation of America submits that because this product was not used in its original, unaltered and unmodified condition, pursuant to K.R.S. 411.310 and K.R.S. 411.320 (1), it should be absolved from any liability to plaintiff.

The Court shall first examine the statutes on which Dynamics Corporation of America relies to buttress the second prong of its motion for summary judgment.

K.R.S. 411.310, which concerns presumptions in product liability actions, states as follows:

> (1) In any product liability action, it shall be presumed, until rebutted by a preponderance of the evidence to the contrary, that the subject product was not defective if the injury, death or property damage occurred either more than five (5) years after the date of sale to the first consumer or more than eight (8) years after the date of manufacture.
>
> (2) In any product liability action, it shall be presumed, until rebutted by a preponderance of the evidence to the contrary, that the product was not defective if the design, methods of manufacture, and testing conformed to the generally recognized and prevailing standards or the state of the art in existence at the time the design was prepared, and the product was manufactured.

K.R.S. 411.320(1) speaks to circumstances under which a defendant is liable in products liability actions, as follows:

> (1) In any product liability action, a manufacturer shall be liable only for the personal injury, death or property damage that would have occurred if the product had been used in its original, unaltered and unmodified condition. For the purpose

> of this section, product alteration or modification shall include failure to observe routine care and maintenance, but shall not include ordinary wear and tear. This section shall apply to alterations or modifications made by any person or entity, except those made in accordance with specifications or instructions furnished by the manufacturer.

There is unrefuted evidence of record that the product in question had been substantially modified and altered. Dynamics Corporation of America submits the unrebutted affidavit of its National Service Manager, Robert Thayer, who states that on July 6, 1983, he investigated the "Little Giant" portable elevator, model 21. Mr. Thayer states that this machine was manufactured and sold some time between August of 1967 and May of 1968.

Mr. Thayer further states, as follows:

> (4) At the time of the manufacturing of this equipment there were no federal, state or local codes which specifically applied to agricultural products' standards. The defendant's product was in par with competitors and met the standards proscribed by the American Society of Agricultural Engineering (ASAE).
>
> (5) The product had been heavily modified, in particular the power takeoff (PTO). The PTO was not the original equipment. The PTO is made up of two (2) rods. The back rod was not the original rod manufactured by Dynamics. The lemon shaped implement end did not have the factory equipped key and set screw as the original. Instead, someone had drilled out the hole on the knuckle (PTO) and installed a very dangerous bolt and nut which protruded about ¾ of an inch from the knuckle on one side and about the same on the opposite side. The factory equipped setscrew would not have protruded.

The altered setscrew undoubtedly caught injured's clothing.

(6) Other modifications included the removal of a shield covering the drive gear on the right side, and the addition of a trailer hitch which raised the PTO five to six inches.

(7) From the facts of the accident, any [sic] my examination of the equipment, the nut and bolt alteration to the original equipment, as described in paragraph 5, caused the injury.

Under K.R.S. 411.310, there is a presumption that the product is not defective if the injury occurred either five years after the date of sale to the first consumer or more than eight years after the date of manufacture.

The record indicates that third-party defendants Harold Johnson, who was not the first consumer of this product, purchased this machine at an estate auction in 1979. Defendant Dynamics Corporation of America had no knowledge of the chain of custody in the interim between its date of manufacture and sale to the original consumer (circa 1967-1968) and the date of plaintiff's injury (October 22, 1982).

From the record, the court must conclude that plaintiff's injury occurred more than five years after the date of sale to the original consumer and also more than eight years after the date of manufacture.

It is clear that the defendant Dynamics Corporation of America is entitled to the presumption afforded it by K.R.S. 411.310(1) and (2). Plaintiff has not come forward with any evidence to rebut this presumption.

Furthermore, it is equally clear that under K.R.S. 411.320(1), Dynamics Corporation of America would only be liable for plaintiff's injury "if the product had

been used in its original, unaltered and unmodified condition."

There is no doubt that this product had been substantially modified and altered by one or more individual consumers subsequent to its date of manufacture in the late 1960's. Inasmuch as there is no way to determine what injury, if any, plaintiff would have received if the "Little Giant" had been used in its original, unaltered and unmodified condition, the question of liability is purely academic. The defendant Dynamics Corporation of America cannot be liable to plaintiff under these circumstances.

Applying the law to the foregoing, unrebutted statements of Mr. Thayer, it appears that the motion of Dynamics Corporation of America has merit and that it is entitled to summary judgment as a matter of law.

Consequently, since the court is of the opinion that Dynamics Corporation of America is entitled to summary judgment based on the second prong of its argument; there is no need to address the first prong of its argument.

Turning now to the motion of the third-party defendants, Harold Johnson and Danny Towles, to dismiss the third-party complaint, inasmuch as the resolution of this action by summary judgment in favor of Dynamics Corporation of America likewise resolves said defendant's claim against them for indemnification, their motion requires no definitive ruling and will be passed.

Additionally, the resolution of this action in favor of the defendant Dynamics Corporation of America eliminates (1) the need for the jury trial scheduled for August 24, 1987, and (2) the conflict that all counsel have with this trial date. Their motion for a hearing to reschedule the trial date also requires no ruling and will be passed.

An Order and Judgment will be entered in accordance with this memorandum Opinion.

This 30th day of June, 1987.

/s/ Scott Reed
SCOTT REED
Judge
United States District Court

APPENDIX D

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
LEXINGTON

Civil Action No. 83-329

EUGENE MCDOWELL,
Plaintiff,

vs.

DYNAMICS CORPORATION OF AMERICA,
Defendant,

vs.

HAROLD JOHNSON and DANNY TOWLES,
Third-Party Defendants.

[Filed June 30, 1987]

ORDER AND JUDGMENT

* * * *

In accordance with the Memorandum Opinion entered on the same date herewith,

IT IS HEREBY ORDERED AND ADJUDGED, as follows:

1. The motion of defendant Dynamics Corporation of America for summary judgment is GRANTED.

2. Plaintiff shall have no recovery from either the defendant Dynamics Corporation of America or the third-party defendants, Harold Johnson and Danny Towles.

3. The motion of third-party defendants, Harold Johnson and Danny Towles to dismiss the third-party complaint requires no ruling and is PASSED.

4. The joint motion of all counsel herein for a hearing to reschedule the trial date of August 24, 1987, is now moot and is PASSED.

5. This action is now DISMISSED and STRICKEN from the docket.

6. There being no just reason for delay, this is a FINAL and APPEALABLE Order and Judgment.

This 30th day of June, 1987.

/s/ Scott Reed
SCOTT REED
Judge
United States District Court

Copies:

James J. Varellas
William R. Garmer
William J. Gallion
James E. Thompson
E. Durward Weldon
6/30/87
rm

APPENDIX E

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
LEXINGTON

Civil Action No. 83-329

EUGENE MCDOWELL,
Plaintiff,

vs.

DYNAMICS CORPORATION OF AMERICA, *et al.*,
Defendants.

Filed Feb. 25, 1987

MEMORANDUM OPINION AND ORDER

The record reflects that on February 18, 1987, the court heard and took under advisement defendant's motion for summary judgment and the plaintiff's motion to compel discovery from the defendant Dynamics Corporation of America.

In support of its motion for summary judgment, defendant Dynamics Corporation of America relies on K.R.S. 411.320 and the authority of *Reba Pump Co. v. Finck*, 713 S.W.2d 818 (Ky. 1986), wherein the Kentucky Supreme Court held that a manufacturer shall not be liable for injury regardless of fault or defect in a product if it is shown that plaintiff's negligence substantially contributed to his injuries.

Dynamics Corporation of America also asserts that the portable elevator conveyor in question had been altered since it was manufactured and sold some time between August of 1967 and May of 1968, and that such alteration was a contributing cause to plaintiff's injuries, as was his own negligence.

K.R.S. 411.310 provides that in products liability actions, there is a presumption that the product is not defective if the injury occurred either five years after the date of sale or more than eight years after the date of manufacture.

The defendant advised the court at this hearing (1) that discovery had so far disclosed that third-party defendant Harold Johnson had purchased this machine in an estate auction in 1979, and (2) that the defendant had no knowledge of the chain of custody concerning its manufacture circa 1967-1968 and the date of plaintiff's injury, October 22, 1982.

Although the court can well appreciate the defendant's motion for summary judgment and the presumptions to which it is entitled as set out in K.R.S. 411.310 and 411.320, the court is of the opinion that these presumptions should not be used in an effort to frustrate the discovery process. It seems that in a products liability action where there are many questions of material fact, discovery should be completed before any motion for summary judgment may be appropriate.

Consequently, the court is of the opinion that defendant's motion for summary judgment should be denied at this point in time.

Concerning plaintiff's motion to compel discovery from the defendant, it seems that counsel had reached an agreement on this motion. Plaintiff had requested the original drawings of the Little Giant so that he could make an independent determination for himself that the

machine had in fact been altered subsequent to its manufacture. The court was advised that the defendant had only recently come into possession of these drawings.

The court being sufficiently advised,

IT IS HEREBY ORDERED, as follows:

1. The motion of defendant, Dynamics Corporation of America, for summary judgment is DENIED at this time.

2. Plaintiff's motion to compel discovery from the defendant Dynamics Corporation of America is GRANTED.

This 25th day of February, 1987.

/s/ Scott Reed
SCOTT REED
Judge
United States District Court

2/25/ 87 Copies to:

James J. Varellas
William R. Garmer
William J. Gallion
James E. Thompson
E. Durward Weldon

APPENDIX F

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
AT LEXINGTON

Lexington Civil Docket No. 83-239

EUGENE MCDOWELL

VS.

DYNAMICS CORPORATION OF AMERICA

VS.

HAROLD JOHNSON, DANNY EUGENE TOWLES

Lexington, Kentucky
April 24, 1987—1:50 P.M.

TRANSCRIPT OF PRE-TRIAL CONFERENCE
BEFORE THE HONORABLE SCOTT REED

Appearances of Counsel:

On Behalf of the Plaintiff:

WILLIAM R. GARMER, ESQ.
300 W. Short Street
Lexington, Kentucky 40507

On Behalf of Dynamics Corp:

WILLIAM J. GALLION, ESQ.
Suite 210
First National Building
Lexington, Kentucky 40507

On Behalf of Johnson and Towles:

JAMES E. THOMPSON, ESQ.
E. DURWARD WELDON, ESQ.
P.O. Box 726
Richmond, Kentucky 40475

[2] THE COURT: All right. Madam Clerk, would you call the first item on the docket for this afternoon?

THE CLERK: Yes, your honor. Lexington Civil 83-329, Eugene McDowell v. Dynamics Corporation of America v. Harold Johnson, Danny Eugene Towles, for pretrial conference, your honor.

THE COURT: All right. Would you identify yourselves for the record, please?

MR. GARMER: Yes, your honor, I'll Bill Garmer and I represent the plaintiff, Eugene McDowell.

THE COURT: All right, sir.

MR. GALLION: Your honor, I'm Bill Gallion and I represent the defendant, Dynamics Corporation of America.

MR. THOMPSON: If your honor please, I'm Jim Thompson, I represent third-party defendants Harold Johnson and Danny Eugene Towles.

THE COURT: All right, Mr. Thompson.

MR. WELDON: Durward Welding, co-counsel to Mr. Thompson.

THE COURT: All right, sir. Mr. Garmer, you represent the plaintiff?

MR. GARMER: Yes, sir.

THE COURT: Would you give me a little outline of what this case is about?

MR. GARMER: Yes, sir. This is essentially a products [3] liability case, a negligent design and failure to warrant case. Mr. McDowell was working with Mr. Johnson and Mr. Towles in housing some corn, and they were using a corn elevator that was manufactured by the defendant, Dynamics Corporation of America. And in the process of putting the corn into an old house and using the elevator, he became entangled in the power take off, what they call the P.T.O., and he lost his leg. We have alledged that there's a negligent design. Our expert will testify, only we haven't gotten to take his deposition yet, that's a problem we've been having, will testify that there was negligence in not guarding the power take off; and had it been guarded, the injury wouldn't have occurred. And there's also a failure to warn of the danger of the power take off. And that, in a nutshell, is what the case is about.

THE COURT: All right. What are your special damages?

MR. GARMER: Your honor, I don't think I have those with me. I've supplied answers to interrogatories on those. Let's see.

THE COURT: Liability is asserted against Dynamics Corporation of America?

MR. GARMER: Yes, sir. And I might add—

THE COURT: Mr. Gallion, that's your client.

MR. GARMER: Dynamics then brought in Mr. Johnson and Mr. Towles as third-party defendants. We had sued Mr. Johnson and Mr. Towles in Scott circuit court. And before that case [4] went to trial, that was settled. So we have no claim that we're making against Mr. Johnson or Mr. Towles in this action.

THE COURT: All right.

MR. GALLION: Your Honor, Dynamics Corporation Manufactured this machine in, I believe it was, the year 1968 or 1969. We're not sure. The depositions of the design engineer and safety engineer were taken last week. And, as has been pointed out in previously filed motions

to dismiss this case on the basis of the Kentucky Products Liability Act, the injuries of the plaintiff were the result of an alteration and modification to the product. The product is over five years of age, the P.T.O. was not the P.T.O. manufactured by this defendant, the P.T.O., part of it resembled a P.T.O. that was manufactured by or sold along with our product but instead of the originally designed P.T.O., the knuckle portion of the P.T.O. where it hooked into the elevator had been drilled out. And a screw protruding three quarters of an inch on each end of this knuckle, which originally was designed as smooth, caught the plaintiff's pant leg. And we have previously filed motions of summary judgment based on the products liability act. The filed affidavits and the depositions of our people taken last week by the plaintiff further establish the fact that the product liability act is a complete defense to the plaintiff's claim. And the court previously heard arguments on this and entered an order essentially deferring ruling on the motions for [5] summary judgment based upon the products liability act. At this time, we ask the court to reconsider, since the case is set for trial in May and we believe that the evidence is clear.

THE COURT: What's the trial date?

MR. GARMER: May the 24th, Your Honor.

THE COURT: Go ahead. I didn't mean to interrupt you.

MR. GALLION: We think it's clearly a case, it's a case of contributory negligence, which is a complete bar, and we've cited that in our memorandum. The plaintiff's own testimony, he hooked this P.T.O. up that day, he was standing right in the area where the knuckle hooks into the elevator itself, he had worked it for about a half an hour with this screw protruding outside the knuckle and that's where he caught his pant leg at. He had worked 20 some years on farms, was well acquainted with P.T.O.'s, had his own farm equipment that used P.T.O.'s, and we believe the contributory negligence defense bars it.

THE COURT: Have you discussed settlement in this case?

MR. GALLION: Yes, Your Honor, we have some.

THE COURT: Are the lines open?

MR. GALLION: Yes. As a matter of fact, this morning we were discussing it. We've discussed it as recently as this morning.

THE COURT: What are the prospects of settlement?

MR. GALLION: Mr. Garmer wants too much money.

THE COURT: That's a common failing that we learn to [6] endure.

MR. GALLION: We're not so far apart that—

THE COURT: You haven't walked back and said I'll never darken your door again, keep your money.

MR. GALLION: No, Your Honor, we're still talking.

THE COURT: All right. Keep it open. Keep the lines of communication open and keep me advised me.

MR. GARMER: Your Honor, if I may, I would like to respond just briefly to his renewal of the motion for summary judgment on a factual matter that I think it's important for the Court to know. This was brought up before on a motion for summary judgment and the Court deferred ruling on the motion for summary judgment because I had requested interrogatories, certain documents from the defendant and had not gotten those yet. I did get those documents and then we have attempted to set up a deposition of the expert witness who's out in Wichita, Kansas, and because of Mr. Gallion's trial schedule, my trial schedule, and the expert's schedule, we haven't been able to do that. We had it set one time, and we had to cancel because of everybody's conflicting schedules. And I think it's very important to allow that deposition to be taken before the motion for summary judgment.

THE COURT: Well I think maybe that's true.

MR. GALLION: Which raises another problem, Your Honor. I had identified two additional experts, one in

Middletown, [7] Wisconsin, and another one here at University of Kentucky, which Mr. Garmer, of course, wants to depose. I'm not certain that we can get all of this completed by the 24th. I can be ready for trial, but we discussed this yesterday, as a matter of fact, and this morning that this case is becoming more complex as we rapidly approach the trial date.

THE COURT: We're going to have to take some sort of measures to stop that. I don't want to sit and watch the case get more and more complicated. I want to fix it and then move it.

Okay. Anything else, Mr. Gallion?

MR. GALLION: Nothing, Your Honor.

* * * *

[15] THE COURT: * * * Anybody got anything else to say?

MR. GARMER: Not for the plaintiff, Your Honor.

MR. GALLION: Nothing, Your Honor.

MR. TAYLOR: My only inquiry, Your Honor, would be the Court's present thoughts with respect to the May 26 trial date.

THE COURT: As far as the Court is concerned, the Court is ready to try the case on the trial date assigned.

All right. I'll take a look at these pending things in the record and we'll try to get everything in shape to try the case on the date assigned.

By order, exhibits to be introduced at pretrial [16] conference or objections as to the authenticity of exhibits, what about that?

MR. GARMER: Your Honor, one of the problems we have with complying with that is the difficulty we've had in scheduling the expert's depositions because I think at least from my standpoint, a lot of my exhibits are going to be through my expert. And once we take his deposition, we'll be able to comply with that. So I would request, if the Court is willing to, to have that order say

that we can exchange exhibits and number them seven days before the trial.

THE COURT: Make it seven days before the trial.

MR. GARMER: Thank you.

MR. GALLION: We have no objection to that, Your Honor.

THE COURT: Any objection?

MR. TAYLOR: I have mine ready, but I don't want to be the only one to comply with the Court order if the others aren't going to.

MR. GARMER: Your Honor, I will say I filed an exhibit list and witness list today, but I expect the exhibit list to be added to.

MR. TAYLOR: You also asked for instructions to be tendered today.

THE COURT: Yes. How about that, Mr. Thompson?

MR. THOMPSON: We've got our's ready.

THE COURT: You've got a place in heaven.

[17] MR. THOMPSON: You want us to file them, Your Honor?

THE COURT: Yes. All right. I guess we've done all we can do. If you can get that in, and we've talked about the exhibits, and all you can do is the best you can do, Mr. Garmer. So let's not do anything that will slow up the trial date if we can possibly avoid it. I'll look forward to seeing you on May the 26th.

(Proceedings Concluded at 2:20 p.m.)

CERTIFICATE

I, Cynthia A. Oakes, certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

CYNTHIA A. OAKES
RPT, CM

Supreme Court, U.S.
FILED
DEC 13 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-758

In The

Supreme Court of the United States

OCTOBER TERM, 1988

EUGENE McDOWELL

Petitioner,

v.

DYNAMICS CORPORATION OF AMERICA

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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No. 88-758

In The

Supreme Court of the United States

OCTOBER TERM, 1988

EUGENE McDOWELL

Petitioner,

v.

DYNAMICS CORPORATION OF AMERICA

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

Respondent, Dynamics Corporation of America, respectfully prays that a writ of certiorari not be issued to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit entered in the above-entitled proceeding on June 29, 1988.

PERTINENT FEDERAL RULE

Federal Rule of Civil Procedure 56(c) and (e) provide in pertinent part:

> (c) The motion [for summary judgment] shall be served at least ten days before the time fixing for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.
>
> (e) [W]hen a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment if appropriate shall be entered against the adverse party.

STATEMENT OF THE CASE

On October 20, 1988, the petitioner, Eugene McDowell, filed a complaint in the United States District Court for the Eastern District of Kentucky, Lexington Division, alleging that he sustained severe and permanent bodily injuries on or about October 22, 1982 when using a portable elevator conveyor known as a "Little Giant" which was manufactured and designed by the

respondent, Dynamics Corporation of America and/or its said predecessor, Portable Elevator Manufacturing Company.[1] The complaint alleged defective design, failure to warn and breach of implied warranty. In its Answer, respondent denied the allegations set out in the complaint and also affirmatively pleaded the defenses of contributory negligence, the statutory presumption that the product was not defective and the statutory defense of alteration of the product.

Discovery was taken by both petitioner and respondent and on September 4, 1986, the District Court entered an order that discovery was to be completed 60 days from September 4, 1986 and that motions for summary judgment could not be filed later than 90 days after September 4, 1986.

On December 3, 1986, the respondent, Dynamics Corporation, filed a motion for summary judgment as well as a memorandum of law in support of the motion for summary judgment. In the memorandum, the respondent argued that the petitioner was contributorily negligent in causing the accident which resulted in injury to him and therefore, under the Kentucky Products Liability Statute, Ky. Rev. Stat. 411.320(3) (1978), he was barred from recovery. App. 1. Additionally, respondent argued that the product at issue was not used by the petitioner in its original unaltered and unmodified condition and therefore, under Ky. Rev. Stat. 411.320(1) (1978), he was barred

---

[1] In compliance with 28.1 of the Rules of the Supreme Court Dynamics Corporation of America states it has no parent, subsidiary or affiliates.

from recovery. In support of its argument that the petitioner was barred from recovery because the product was not used in an unaltered state, respondent attached the affidavit of Robert Thayre who is the National Service Manager for the Portable Elevator Division of Dynamics Corporation of America. In that affidavit, Mr. Thayre stated that the elevator which was in question was heavily modified and that the alteration caused the petitioner's injury.

Petitioner filed a memorandum in opposition to the motion for summary judgment and in response to the argument that the product had been altered and that the alteration caused his injury, petitioner responded that he had an outstanding request for production of documents and that because the respondent had failed to respond to this request, summary judgment should not be granted. The petitioner also filed a motion to compel the respondent to produce the information which was the subject of the request for production of documents.

On February 18, 1987, the Court conducted a hearing in which the motion for a summary judgment was taken under advisement as was the motion to compel production of documents. Additionally, the Court set a jury trial for May 26, 1987. On February 25, 1987, the District Court entered a memorandum opinion and order denying the respondent's motion for summary judgment at that point in time stating that discovery should be completed before any motion for summary judgment would be appropriate. Additionally, the Court indicated that the respondent had, in fact, provided the documents which were requested and which were subject to the Motion to Compel Discovery.

On April 24, 1987, the District Court held another pre-trial conference. At that time, Dynamics Corporation, orally renewed its motion for summary judgment and asked the Court to reconsider it since the case was set for trial in May of 1987 and the outstanding motion for summary judgment needed to be ruled upon. Petition for Cert., App. 27a. At that time, counsel for petitioner indicated to the Court that it was important to allow the deposition of his expert to be taken before the motion for summary judgment was considered and the court indicated that maybe that was true. Petition for Cert., App. 28a. On April 22, 1987, respondent noticed the discovery deposition of petitioner's expert, Dr. John Sevart for May 15, 1987. On April 24, 1987, the petitioner filed a witness and exhibit list naming Dr. Sevart as well as H. Bradley Hammon as expert witnesses who would testify on beh. 'f of the petitioner at the trial. On May 15th, the deposition of Dr. John Sevart was taken for discovery by respondent.

After the discovery deposition of Dr. John Sevart, petitioner filed no additional pleadings in the District Court responding to the renewed motion for summary judgment. On June 30, 1987, the District Court issued an order sustaining the motion for summary judgment and stating, "there is unrefuted evidence of record that the product in question has been substantially modified and altered." Petition for Certiorari App. 15a. The Court thereafter set out the findings of Mr. Thayer as described in his affidavit and then concluded:

> [I]t is clear that the defendant Dynamics Corporation of America is entitled to the presumption afforded it by KRS 411.310(1) and (2). Plaintiff has not come forward with any evidence to rebut this presumption.

> Furthermore, it is equally clear that under KRS 411.320(1), Dynamics Corporation of America would only be liable for plaintiff's injury 'if the product had been used in its original, unaltered and unmodified condition.'
>
> There is no doubt that this product has been substantially modified and altered by one or more individual consumers subsequent to its date of manufacture in the late 1960's. Inasmuch as there is no way to determine what injury, if any, plaintiff would have received if the 'little giant' had been used in its original, unaltered and unmodified condition, the question of liability is purely academic. The defendant, Dynamics Corporation of America, cannot be liable to plaintiff under these circumstances.

Petition for Cert., App. 16a and 17a.

No petition for reconsideration was ever filed by petitioner with the District Court. Instead, on July 13, 1987, petitioner filed a notice of appeal to the United States Court of Appeals for the Sixth Circuit from the judgment entered in the action on June 30, 1987.

After the District Court had granted the motion for summary judgment, counsel for respondent received a letter from Don K. Smith and Associates, the court reporter who had taken and transcribed the deposition of Dr. John Sevart. The court reporter indicated that as of July 6, 1987, the deposition of Dr. Sevart had been returned to the office with the corrections made by Dr. Sevart and that the deposition was then placed in a court envelope and forwarded to respondent's counsel for safekeeping until the time of trial. App. 10.

On appeal petitioner argued that the testimony of Dr. Sevart which was taken at the discovery deposition established an issue of fact regarding the alteration of the

product in question and therefore, summary judgment was inappropriate. In response, respondent pointed out to the Court that the testimony of Dr. Sevart was not before the District Court at the time that it ruled on the motion for summary judgment and therefore, the appellate court could not consider the testimony of Dr. Sevart in reviewing the District Court's order granting summary judgment. In his reply brief, the petitioner argued that he should not be penalized for the court reporter's failure to file the deposition of Dr. Sevart with the Court and furthermore, requested the Court of Appeals once again to consider the deposition of Dr. Sevart which had been included in the record after the notice of appeal had been filed by petitioner.

In response to the petitioner's argument that the court reporter and counsel for respondent had failed to file the deposition of Dr. Sevart, respondent filed a motion to supplement the record with the letter from the court reporter indicating that, in fact, the transcript of the deposition of Dr. Sevart was not completed by the court reporter nor even sent to respondent's counsel until July 6, 1987, after the court had already sustained the motion for summary judgment. Furthermore, counsel for respondent filed an affidavit stating that the transcribed deposition of Dr. Sevart was not sent to him until July 6, 1987. App. 11. The District Court supplemented the record on appeal with the deposition of Dr. Sevart, the letter from the court reporter who took and transcribed Dr. Sevart's deposition and the affidavit from respondent's counsel. Petitioner also asked the United States Court of Appeals for the Sixth Circuit to supplement the record on appeal

with a transcript of the hearing which was conducted in the District Court on April 24, 1987 wherein the respondent, Dynamics Corporation, renewed the motion for summary judgment.

After briefs were filed with the Court of Appeals, oral argument was conducted. On June 29, 1988, the Court issued an opinion affirming the District Court's order granting summary judgment. In the opinion, the Court stated there is precedent to consider depositions despite their late filing under Fed. R. App. P. 10(e). However, the Court found that the petitioner could not rely on Rule 10(e) because the District Court never in any fashion considered the evidence in the depositions because the evidence was never brought to its attention. The Court stated:

> [I]t is for the party opposing such a motion to bring to the attention of the District Court those relevant materials upon which he seeks to rely. Neither by motion nor by a petition for reconsideration did plaintiff's counsel advise the District Court of the contents of the late filed affidavits and seek reconsideration. Regardless of whether or not the parties had knowledge of the contents of the depositions in dispute and their alleged evidentiary value, the judge must be advised or informed when a summary judgment motion is outstanding as to responsive materials relied upon.

Petition for Cert., App. 7a, 8a and 9a.

The petitioner filed a petition for rehearing en banc and the Court of Appeals denied the petition on the basis that the issues raised in the petition were fully considered upon the original submission and decision of the case.

REASONS FOR DENYING THE WRIT OF CERTIORARI

The Court below was correct in affirming the judgment of the District Court granting the respondent, Dynamics Corporation of America, summary judgment. This is a case in which the petitioner failed to take any affirmative action in order to counter the motion and memorandum of law in support of the motion for summary judgment. As a result of the petitioner's failure to take any affirmative action whatsoever, the motion for summary judgment was granted.

Petitioner seeks to place blame on the court reporter. The court reporter had not even completed the deposition of Dr. John Sevart until after the Court granted the summary judgment motion. Therefore, any omission on the part of the court reporter is immaterial and irrelevant to the appropriateness of the District Court's order.

Fed. R. Civ. P. 56(c) sets out specific duties on the part of the non-movant party on a motion for summary judgment. Petitioner failed to follow the directives of the rule and this failure resulted in the District Court's deciding the motion for summary judgment on an incomplete record. The petition for writ of certiorari to this Court is one last effort on the part of the petitioner to rectify the error he made in the lower courts.

The petitioner argues there is a conflict within the circuits on the inherent power of courts of appeal to consider evidence not presented to trial courts. This alleged conflict does not exist. Fed. R. App. P. 10(e) is a uniform rule which guides all appellate courts on when they can enlarge a record on appeal to consider matters not previously submitted to the lower courts. The Rule

allows the appellate court, in some circumstances, to enlarge the record on appeal to consider matters which are not in the record but were, in fact, relied upon by the lower courts. The cases cited by the petitioner to support his allegation that there is, in fact, a conflict in the circuits are cases in which the court ruled that it was inappropriate to exercise the authority granted by Fed. R. App. P. 10(e). There are cases from these same circuits ruling that new evidence and issues cannot be reviewed on appeal when they were not brought first to the lower court's attention.

Finally, petitioner alleges in his statement for reasons to grant certiorari that Dynamics does not dispute that summary judgment could not have been granted in the face of the Sevart deposition. The respondent, Dynamics, vehemently disagrees with this statement and submits that regardless of what evidence petitioner submitted on his behalf by any expert witnesses, the Kentucky Products Liability Statute, Ky. Rev. Stat. 411.320 (1978) is so broad as to establish a complete defense to the manufacturer in cases such as this one. The product was altered and this alteration was a substantial cause in the occurrence that caused the injury or damage to the petitioner and therefore, the summary judgment was appropriate.

I. THE DECISION BELOW DID NOT PENALIZE THE PETITIONER FOR A REPORTER'S FAILURE TO FOLLOW RULE 30(f)(1).

Petitioner argues that the Court below penalized him for the court reporter's failure to file the transcript of the deposition of Dr. John Sevart with the District Court Clerk. This argument misinterprets the Appellate Court's opinion.

The respondent agrees that the court reporter who took and transcribed the deposition of the petitioner's expert, Dr. John Sevart failed to file a copy of the transcript, upon completion, with the District Court Clerk. However, this omission occurred after the District Court Judge had already entered an order granting the motion for summary judgment filed by the respondent.

The respondent renewed its motion for summary judgment at a hearing which was conducted in the District Court on April 24, 1987. On May 15, 1987, the discovery deposition of Dr. John Sevart was taken by the respondent. Thereafter, the deposition was not even completed to be filed until July 6, 1987. After the deposition of Dr. John Sevart was taken, the petitioner failed to file any pleading in the District Court alerting the Court to the fact that the deposition was taken and that review of the motion for summary judgment motion should be postponed until after the deposition was filed with the Court. Additionally, petitioner failed to file any pleading setting forth statements made by Dr. Sevart at his deposition which would rebut the evidence presented by the respondents in the motion for summary judgment. Although at the hearing the Court agreed with the petitioner that perhaps the deposition needed to be taken before the summary judgment motion should be considered; after the deposition was taken, the Court was never advised by petitioner that there was any specific evidence developed in this deposition which raised an issue of fact. The court reporter's omission in failing to file the copy of the transcript of Dr. Sevart according to Fed. R. Civ. P. 30(f)(1) was an omission after the fact and therefore, the District Court's failure to review the deposition

was not a result of the omission on the part of the court reporter.

The rule regarding summary judgment specifically sets out duties on the part of the non-movant party when a motion for summary judgment is pending before a Court. Fed. R. Civ. P. 56(c) provides in part that summary judgment shall be rendered if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. Fed. R. Civ. P. 56(c) further provides that when a motion for summary judgment is made and supported, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party. In this situation, it was encumbent upon the petitioner's attorney to file some response once the summary judgment motion was renewed at the April 24, 1987 hearing. His failure to file any response setting out specific facts showing that there was a genuine issue for trial was fatal to his claim.

It should be pointed out to the court that, in fact, the record on appeal included the deposition of Dr. Sevart. The Court of Appeals did not rule that the deposition of Dr. Sevart could not be included in the record; rather, it ruled that the appellate court could not review the deposition in light of the fact that the evidence contained in that deposition was not brought to the lower court's

attention at the time that a consideration of the motion for summary judgment was had. The Court of Appeals did not penalize the petitioner for the reporter's failure; it penalized the petitioner for his own failure to bring to the District Court's attention the evidence contained within the deposition of Dr. Sevart.

The petitioner argues that the Court of Appeals' decision not to review the deposition of Dr. Sevart is in conflict with other circuits. Specifically, the petitioner cites *Ross v. Kemp*, 785 F.2d 1467 (11th Cir. 1986). *Ross* involved a federal habeas corpus petition by a petitioner who had been convicted of murder and other crimes. The petitioner claimed that there was systematic discrimination in the formulation of the jury which convicted him. During the habeas proceeding at the district court level, the petitioner's attorney had, in fact, taken depositions which were never included into the record. In ruling that the record could be supplemented with one of the depositions, the Court of Appeals stated "[B]oth the appellant and appellees relied on the Murphy deposition in their pleadings. According to circuit precedent, it is appropriate to supplement the record with a deposition and upon which parties relied even though for some unexplained reason it was not filed below." *Id.* at 1472. The petitioner in *Ross* also had requested the Court's permission to supplement the record on appeal with affidavits. The Court stated, "Because the information of the affidavits was not before the District Court in any form, and because neither of the parties relied on the evidence at an earlier point in the proceedings, Fed. R. App. P. 10(e) is inapplicable to this portion of the motion to supplement." *Id.* at 1474. The Court went on to discuss three separate

factors which courts should address in deciding whether to exercise discretionary authority to permit supplementation of the record on appeal. One of the factors which is critical to this case is whether the petitioner's failure to present the proffered material at the lower court was a result of inexcusable neglect. *Id.* at 1476. In this case, there is no question but that the evidence contained in the deposition of Dr. Sevart was not before the District Court because of inexcusable neglect on the part of the petitioner. Far from establishing a conflict with the Sixth Circuit, the Eleventh Circuit in *Ross* articulated a rule under which the petitioner's claim that the lower Court was erroneous in failing to consider the deposition must fail.

The petition also cites *McDaniel v. Travelers Insurance Co.*, 494 F.2d 1189 (5th Cir. 1974) for his proposition that the Court of Appeals erred in not considering the deposition of Dr. Sevart in reviewing the lower Court's order granting summary judgment. In *McDaniel*, the appellant cited to an omitted deposition in a brief and because of this documented reliance, the Court supplemented the record on appeal. *Id.* at 1190. *McDaniel* is factually distinguishable from the facts in this case as here, petitioner did not indicate to the Court that he was relying on specific testimony in the deposition of Dr. Sevart.

Petitioner argues that he did demonstrate to the District Court that he was relying on the deposition of Dr. Sevart by telling the Court at the hearing that the Court should await ruling on the motion for summary judgment until after the deposition of Sevart had been taken and by filing a witness list in which Dr. Sevart's name and the proposed substance of his testimony was included. The

fact remains that the petitioner failed to file any response whatsoever to the renewed motion for summary judgment. Even after the deposition of Dr. Sevart had been taken, the petitioner failed to bring to the Court's attention any evidence which was developed in that deposition which would counter the evidence submitted in support of the motion for summary judgment.

In both *Ross* and *McDaniel*, the petitioner's reliance on the omitted evidence was demonstrated by citation to the evidence in briefs and pleadings before the Court. No such reliance was demonstrated by the petitioner in this case. The petitioner didn't even schedule the deposition of Dr. Sevart; the deposition was scheduled for discovery purposes by respondent. The petitioner failed to develop any proof whatsoever to counter the motion for summary judgment and this failure resulted in a dismissal of his claim.

The petitioner argues that the entry of summary judgment against him was fundamentally unfair and cites a concurring opinion by Justice White in *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986). The petitioner argues that the concurring opinion of Justice White is controlling. However, a review of the Court's opinion will demonstrate that the majority opinion was written by Justice Rehnquist and Justice White concurred in the Court's opinion and judgment. Therefore, Justice White's opinion is not the controlling opinion of the Court.

In *Celotex*, the Court addressed the issue of the moving party's burden in a motion for summary judgment under the Fed. R. Civ. P. 56. The majority stated, "Rule 56(e) therefore requires a non-moving party to go beyond

the pleadings and by her own affidavits, or by the 'depositions, answers to interrogatories and admissions on file,' designate 'specific facts showing that there is a genuine issue for trial.' " *Id.* at 324. This Court recognized that a non-moving party must do more than merely rest on his pleadings in order to counter a motion for summary judgment and the Rules require him to affirmatively designate specific facts which show a genuine issue for trial. Petitioner argues that the lower Court knew that he was relying on the deposition of Dr. Sevart. The petitioner did not fully discharge his burden as he did not specify facts to the District Court showing that there was a genuine issue for trial. Therefore, the District Court did not know he was relying on any specific evidence from Dr. Sevart. The court reporter's failure to file the deposition was immaterial. The Court of Appeals correctly ruled that the summary judgment was appropriate under these facts.

II. THERE IS NOT A CONFLICT IN THE CIRCUITS OVER WHETHER A COURT OF APPEALS HAS INHERENT POWER TO CONSIDER EVIDENCE NOT PRESENTED TO THE DISTRICT COURT.

In order to rectify his own error in failing to bring specific facts to the District Court's attention to show that there was a genuine issue for trial and therefore, summary judgment would not be appropriate, the petitioner argues that there is a conflict in the circuits over whether an appellate court has inherent power to consider evidence not presented to the district court. The petitioner argues that there is a conflict in the circuits between decisions of the Third, Fifth, Seventh and Tenth Circuits

and decisions of the District of Columbia, Second, Eighth and Eleventh Circuits. In essence, the petitioner has searched for cases from the D.C., Second, Eighth and Eleventh Circuits to support his alleged argument of a conflict in the circuits. In fact, there is no conflict in the circuits as there are cases from the District of Columbia, Second, Eighth and Eleventh Circuits which have ruled that the court of appeals does not have the power to consider evidence not presented to the district court. This alleged conflict in the circuits has been fabricated by the petitioner in order to tailor his petition to fit within the requirements of U.S. Supreme Court Rule 17.

Petitioner claims that the case of *Dickerson v. Alabama*, 667 F.2d 1364 (11th Cir. 1982), *cert. denied* 459 U.S. 878 (1982) establishes the Eleventh Circuit's position that evidence not submitted on the district court level is reviewable by a court of appeals. In *Dickerson*, the Court noted that there is authority to permit supplementation of the record but acknowledged that federal appellate courts do not often supplement the record on appeal with evidence not reviewed by the Court below. *Id.* at 1367. *Dickerson*, involved a pro se petition for a writ of habeas corpus filed by the petitioner in the Northern District of Alabama. The evidence which was omitted from the District Court was a trial transcript. The Court stated that whether an appellate record should be supplemented under the particular circumstances of a case is a matter left to the discretion of the federal courts of appeals and emphasized that in that case it was asked to review the District Court's review of the habeas corpus claim of a state prisoner. Clearly, the omission of a state trial transcript in reviewing a habeas corpus petition from a state

prisoner is quite different from the factual situation in this case and thus is not controlling authority.

The Eleventh Circuit has, in fact, ruled that evidence not considered at the district court level will not be reviewed by the appellate court. *In Re Inspection of Norfolk Dredging Company,* 783 F.2d 1526 (11th Cir. 1986) *cert. denied* 479 U.S. 883 (1986) involved a civil action in which one of the parties attached certain documents to his brief and the opposing party requested the Court to strike the attachments. The Court granted the motion to strike because the documents were not presented to the District Court. *Id.* at 1532, n. 7.

Ross is also an inapplicable basis on which to argue that the Eleventh Circuit permits supplementation of the record considered on appeal in all situations. The Eleventh Circuit in *Ross* permitted the supplementation with one deposition as the parties had relied on that deposition in pleadings before the District Court. *Ross v. Kemp,* 785 F.2d 1467, 1472 (11th Cir.). However, the Court ruled that the record would not be supplemented with another deposition which was not included in the District Court record and that affidavits may or may not be permitted in the record on appeal depending on whether the omission was a result of inexcusable neglect on the part of the attorney. *Id.* at 1472, 1476.

First Alabama Bank v. Parsons Steel, Inc., 825 F.2d 1475, 1487 (11th Cir. 1987) does not evidence a conflict in the circuits because in that case, the Court of Appeals did not permit supplementation of the record and stated that it felt no need to exercise its discretion in the case because the appellants could not specifically state whether the

District Court relied upon specific documents which the appellant sought to be included in the record on appeal. The Court in *United States v. Bosby*, 675 F.2d 1174, 1181 (11th Cir. 1982) recognized that generally an appellate court will not consider matters outside the record and held that affidavits which were submitted on appeal but were not submitted at the District Court level would not be considered because they were not properly before the Court.

The Eighth Circuit in *Turk v. United States*, 429 F.2d 1327 (8th Cir. 1970), far from articulating a general rule that the court of appeals should supplement the record on appeal in all situations, specifically tailored its ruling to permit the record enlarged for purposes of reviewing the issue of probable cause. In *Katsev v. Coleman*, 530 F.2d 176 (8th Cir. 1976), the Court had before it a case more similar to this case in that residents near a site of a proposed highway had filed suit to stop the construction and the District Court had granted summary judgment to the defendants. The Court affirmed, stating that the plaintiff's contention was not properly before the Court on appeal because the allegation was not considered by the District Court. *Id.* at 180. *See also Brennan v. Maxey's Yamaha, Inc.*, 513 F.2d 179, 184 (8th Cir. 1973). ("While Maxey's contention has some logic to commend it, we are foreclosed from considering it because it was not raised below.")

Although the District of Columbia Circuit ruled in *Gatewood v. United States*, 209 F.2d 789 (D.C. Cir. 1953) that the record should be supplemented on appeal, the opinion provided authority for supplementation only when the evidence sought to be included in the appellate

record was in reality part of the record at the trial. That is not the situation in this case as the petitioner failed to make Dr. Sevart's testimony part of the record before the District Court when the motion for summary judgment was finally reviewed. Furthermore, in another opinion from the District of Columbia Circuit, *Hardy v. Northwestern Federal Savings & Loan Association*, 254 F.2d 70 (D.C. Cir. 1957), the Court reviewed an order granting summary judgment to the defendant when the appellant attempted to raise a point on appeal which was not raised at the District Court level. The Court ruled, "[W]e will not consider such a point raised for the first time on appeal." *Id.* at 71.

Petitioner also argues that the Second Circuit is in conflict with other circuits which prohibit an appellate court from considering issues not presented to the court below. In *United States v. Aulet*, 618 F.2d 182 (2nd Cir. 1980), *cert. denied*, 469 U.S. 933 (1984), the appellant claimed that he had ineffective assistance of counsel at a trial resulting in a conviction for knowing importation of cocaine; an argument which had not been addressed at the lower court level. Before ruling that under the facts of that case it would review the new argument, the Court recognized that generally, an appellate court will not consider an issue that has not been presented to the court below. *Id.* at 185. The Second Circuit has ruled in another case more factually akin to this case, *Dictograph Products Co. v. Sonotone Corp.*, 231 F.2d 867 (2nd Cir., 1956), *cert. dismissed* 352 U.S. 883 (1956) that an appellate court may not consider any depositions or other evidence that were not filed at the time the district court decided the motion. The Court stated, "this court has no jurisdiction save to

correct errors, and it cannot be an error to ignore evidence never presented to the court." *Id.* at 867.

This Court has previously decided the issue as to whether a court of appeals may decide an issue or review evidence which was not presented at the lower court level. In *Singleton v. Wolf*, 428 U.S. 106 (1976), this Court decided whether a court of appeals may proceed to determine a case on the merits when it was reviewing a denial of jurisdiction at the district court level based on a lack of standing. In an opinion delivered by Mr. Justice Blackman, the Court reiterated that it is the general rule that a federal appellate court does not consider an issue not passed upon below. *Id.* at 120. In *Braverman v. United States*, 317 U.S. 49, 55 (1942), this Court ruled that an appellate court will not review evidence which is not part of the record. Clearly, there is precedent in the United States Supreme Court that a court of appeals may not review issues or evidence which were not before the lower court. Because this Court has previously articulated a clear rule regarding the issue for which the petitioner requests additional review, the petition for writ of certiorari should be denied.

III. REVIEW BY THIS COURT IS NOT NECESSARY TO ENSURE UNIFORM PROCEDURES IN THE FEDERAL COURTS.

The petitioner argues that this Court should grant the writ to ensure uniform procedures in the handling of appeals throughout the federal judicial system. As previously stated, there is no conflict in the circuits regarding what issues and evidence an appellate court may review in an appeal. The United States Supreme Court has spoken on this issue and there is ample authority in all circuits for the established rule that issues and evidence not raised at the lower court are inappropriate matters for review on appeal.

The petitioner erred in not responding to the motion for summary judgment raised in the District Court. The court reporter's failure to file a copy of the omitted deposition with the District Court was a mistake which occurred after the Court had already ruled on the motion for summary judgment. The United States Court of Appeals for the Sixth Circuit was correct in ruling that it did not have the authority to consider evidence on appeal which was not considered at the District Court level. There is no authority which would support a contrary result.

CONCLUSION

For the foregoing reasons, this Court should deny the petitioner a writ of certiorari to the United States Court of Appeals for the Sixth Circuit.

Respectfully submitted,

WILLIAM J. GALLION
GALLION, BAKER & BRAY, P.S.C.
210 First National Building
Lexington, Kentucky 40507
Telephone (606) 255-6885

APPENDICES

APPENDIX A

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
AT LEXINGTON
NO. 83-329

EUGENE McDOWELL — PLAINTIFF

vs. *MEMORANDUM IN SUPPORT OF DEFENDANT'S MOTION FOR SUMMARY JUDGMENT*

DYNAMICS CORPORATION OF AMERICA — DEFENDANT

vs.

HAROLD JOHNSON and DANNY EUGENE TOWLES — THIRD-PARTY DEFENDANTS

** ** ** ** **

Comes the defendant, Dynamics Corporation of America, by counsel, and for its Memorandum of Law in Support of its Motion for Summary Judgment states the following:

On October 19, 1983, the plaintiff filed a Complaint against the defendant, Dynamics Corporation of America, seeking damages which allegedly resulted when he was injured when his trouser leg became entwined within the moving parts of a portable conveyor allegedly manufactured by the defendant, Dynamics Corporation of America. The products liability Complaint alleged the conveyor was defective, inherently dangerous, and unsafe because it was not designed to be as safe as reasonably possible under the present state of the art of the design of such portable conveyors at the time of its design and manufacture. Based on the pleadings, depositions in the record, and Affidavit of Robert Thayer filed

herein, the defendant, Dynamics Corporation of America, is entitled to summary judgment as a matter of law because the plaintiff was contributorily negligent in operating the conveyor and said negligence substantially contributed to the injury for which he is presently seeking damages and also because the plaintiff has failed to prove that the conveyor was used in its original, unaltered and unmodified condition. In fact, the evidence contained in the accompanying Affidavit from Robert Thayer, National Service Manager for the Portable Elevator Division of Dynamics Corporation of America, shows that the conveyor used by the plaintiff was heavily modified and altered and such alteration caused the plaintiff's injuries.

I. THE PLAINTIFF WAS CONTIBUTORILY NEGLIGENT AND SUCH NEGLIGENCE SUBSTANTIALLY CONTRIBUTED TO HIS INJURIES SUCH THAT HE IS BARRED FROM RECOVERY.

The plaintiff, Eugene McDowell, had worked in farming off and on all his life. (Eugene McDowell deposition number 2, hereinafter "McDowell #2", p. 4) He also worked for 25 years with Assex Corporation as a machine operator and a foreman. (*Id.*) Mr. McDowell owned his own farm since 1950. (*Id.*) He previously worked with grain elevators although he did not use one of his farm. (McDowell #2, p. 6) He has, however, owned equipment with a power takeoff device, i.e. a mowing machine bought in 1967. (*Id.*) The elevator which is the subject of this action was owned by Harold Johnson, who is the plaintiff's brother-in-law. (McDowell #2, p. 7) Mr. Dowell worked with Harold Johnson a lot and specifically

worked with him using the Little Giant elevator approximately three or four years before the date of his injury. (McDowell #2, p. 8) Mr. McDowell was familiar with how a power takeoff works once it is engaged and knows that it rotates. (Deposition of Eugene McDowell number 1, Appendix to deposition number 2, hereinafter "McDowell #1", p. 9.)

On the date plaintiff was allegedly injured, he hooked up the Little Giant elevator up to the tractor and also hooked the power takeoff to the tractor. (McDowell #2, p. 18.) Mr. McDowell noticed that there was no cover over the power takeoff. (McDowell #2, p. 21.) He also knew better than to put his clothing or body into the PTO shaft because he could get hurt. (McDowell #1, p. 10.)

Under KRS 411.320 Section 3, in any product liability action, if the plaintiff failed to exercise ordinary care in the circumstances in his use of the product, and such failure was a substantial cause of the occurrence that caused injury or damage to the plaintiff, the defendant shall not be liable whether or not said defendant was at fault or the product was defective. This statute, as recently interpreted by the Kentucky Supreme Court in *Reda Pump Co. v. Finck,* Ky. 713 S.W.2d 818, 820 (1986), absolutely bars recovery in cases where contributory negligence of the plaintiff substantially contributes to cause an occurrence which injures the plaintiff. In this case, Mr. McDowell understood and perceived the risk of coming in close contact with the PTO shaft and his failure to take appropriate precautions in positioning himself far enough away from the rotating shaft to prevent his clothing from coming in contact with the shaft was a substantial contributing factor causing the accident which

resulted in his serious injuries. In determining whether a person is contributorily negligent, the surrounding circumstances must be considered, such as the exigency under which a person acted and his knowledge, whether actual or imputed, of the danger and the nature of the risk incurred. *Milby v. Mears*, Ky. App. 580 S.W.2d 724 (1979). There is no evidence that Mr. McDowell was working under exigent circumstances. He was familiar with the machinery and specifically with farm machinery since he was a farmer most of his life and worked as a machine operator for 25 years. Most importantly, he knew how the PTO shaft worked on the Little Giant conveyor because he had worked with the same machine for three to four years before his injury. He knew the nature of the risk involved in coming into contact with the rotating PTO shaft but he failed to protect himself. Under KRS 411.320 Section 3, Mr. McDowell's unfortunate negligence bars him from recovery against the defendant, Dynamics Corporation of America. The defendant, Dynamics Corporation of America, is entitled to a summary judgment as a matter of law.

II. THE LITTLE GIANT CONVEYOR AT ISSUE IN THIS CASE WAS NOT USED BY THE PLAINTIFF IN ITS ORIGINAL, UNALTERED AND UNMODIFIED CONDITION AND THEREFORE THE DEFENDANT IS NOT LIABLE FOR ANY INJURY RESULTING FROM ITS USE UNDER KRS 411.320 SECTION 1.

KRS 411.320 Section 1 provides: In any product liability action, a manufacturer shall be liable only for the personal injury, death or property damage that would

have occurred if the product had been used in its original, unaltered and unmodified condition. For the purpose of this section, product alteration or modification shall include failure to observe routine care and maintenance, but shall not include ordinary wear and tear. This section shall apply to alterations or modifications made by any person or entity, except those made in the accordance with specifications or instructions furnished by the manufacturer.

On July 6, 1983, Robert Thayer, who is the National Service Manager for the Portable Elevator Division of Dynamics Corporation of America, conducted an investigation of the portable elevator which allegedly caused the plaintiff's injuries. See accompanying Affidavit. According to Mr. Thayer, the Little Giant elevator was heavily modified and specifically, the power takeoff had been altered such that the back rod which was in place on the PTO was not the original rod manufactured by Dynamics Corporation of America. The "lemon-shaped implement end did not have the factory-equipped key and set screw" which existed on the original machine and in its place, someone had installed a bolt and nut which protruded about three quarters of an inch from the knuckle of the PTO on either side. Other modifications included removal of a shield covering the drive gear on the right side and the addition of a trailer hitch which raised the PTO five to six inches.

Because the elevator which Mr. McDowell used on the day of his injuries was substantially modified and altered and therefore was not used in its original condition, the plaintiff is not entitled to recover from the manufacturer, defendant Dynamics Corporation of America, under KRS 411.320 Section 1. The defendant,

Dynamics Corporation of America, is entitled to summary judgment as a matter of law.

CONCLUSION

For the reasons stated herein, the defendant, Dynamics Corporation of America, respectfully requests this court to enter summary judgment in its favor.

GALLION, EDELMAN, BAKER & BRAY

BY: /s/ William J. Gallion
WILLIAM J. GALLION
210 First National Bldg.
Lexington, KY 40507
(606) 255-6885

ATTORNEYS FOR DEFENDANT

CERTIFICATE OF SERVICE

I hereby certify that true and correct copies of the foregoing Motion for Summary Judgment were served upon all parties herein by mailing same to the Hon. James J. Varellas, Suite 400, 134 North Limestone, Lexington, Kentucky 40507, the Hon. William R. Garmer, 300 West Short Street, Lexington, Kentucky 40507, Mr. Danny Eugene Towles, Route 3, Box 311, Stamping Ground, Kentucky 40324, and Mr. Harold Johnson, Route 3, Box 3316, Georgetown, Kentucky 40324 on this the 3rd day of December, 1986.

/s/ William J. Gallion
WILLIAM J. GALLION

AFFIDAVIT OF ROBERT THAYER

Comes the affiant, ROBERT THAYER, after being duly sworn, deposes and states as follows:

(1) That I am now, and at all times referred to herein the National Service Manager for the Portable Elevator Division of Dynamics Corporation of America.

(2) That on July 6, 1983 I conducted an investigation of the portable elevator owned by Mr. Harold Johnson and the part of the same elevator which allegedly caused the injury to Mr. Eugene McDowell on October 22, 1982.

(3) That the investigation determined the elevator was a "Little Giant" portable elevator which was manufactured by Dynamics Corporation, and probably distributed by Brinly-Hardy of Louisville. The elevator was model 21. The machine's design and decals on the elevator indicate it was manufactured and sold sometime between August, 1967 and May, 1968.

(4) At the time of the manufacturing of this equipment there were no federal, state or local codes which specifically applied to agricultural products' standards. The defendant's product was in par with competitors and met the standards proscribed by the American Society of Agricultural Engineering (ASAE).

(5) The product had been heavily modified, in particular the power takeoff (PTO). The PTO was not the original equipment. The PTO is made up of two (2) rods. The back rod was not the original rod manufactured by Dynamics. The lemon shaped implement end did not have the factory equipped key and set screw as the original. Instead someone had drilled out the hole on the

knuckle (PTO) and installed a very dangerous bolt and nut which protruded about 3/4 of an inch from the knuckle on one side and about the same on the opposite side. The factor equipped setscrew would not have protruded. The altered setscrew undoubtedly caught injured's clothing.

(6) Other modifications included the removal of a shield covering the drive gear on the right side, and the addition of a trailer hitch which raised PTO five to six inches.

(7) From the facts of the accident, and my examination of the equipment, the nut and bolt alteration to the original equipment, as described in paragraph 5, caused the injury.

Further affiant saith not.

/s/ Robert Thayer
ROBERT THAYER
Dynamics Corporation of America
Portable Elevator Division
P.O. Box 2947
Bloomington, IL 61701

STATE OF KENTUCKY)
) SCT.
COUNTY OF FAYETTE)

Subscribed and sworn to before me by Robert Thayer on this the ___ day of September, 1985.

My commission expires: _____.

_____
NOTARY PUBLIC, STATE AT LARGE, IL

STATE OF ILLINOIS

COUNTY OF McLEAN

Subscribed and sworn to before me by Robert Thayer on this the 7 day of October, 1985.

My Commission expires: March 2, 1986.

/s/ Larry W. Hankins
NOTARY PUBLIC, STATE AT LARGE, IL

APPENDIX B

DON K. SMITH & ASSOCIATES
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710 W. Douglas 1-800-346-3025
Wichita, KS 67203 July 6, 1987 Ext. 487

Mr. William J. Gallion
Attorney at Law
First National Bank Bldg, Suite 210
Lexington, KY 40507

RE: McDOWELL vs. DYNAMICS CORP.
Case No. 83-329

Dear Mr. Gallion:

This is to advise you that the original transcript of the deposition of JOHN B. SEVART, P.E., taken on behalf of the defendants on the 15th day of May, 1987, in the above-entitled case has been returned to this office with the enclosed correction sheet.

The deposition will now be placed in a court envelope and forwarded to you for safekeeping until the time of trial.

Very truly yours,

/s/ Don K. Smith, C.S.R.
DON K. SMITH & ASSOCIATES

cc: Mr. William R. Garner

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT
NO. 87-5794

EUGENE McDOWELL PLAINTIFF

V. *AFFIDAVIT*

DYNAMICS CORPORATION OF AMERICA
DEFENDANT

** ** **

I, William J. Gallion, being first duly sworn, depose and state as follows:

1. That this Affidavit is made on personal knowledge after a review of the pertinent records in this matter and is submitted in response to an appeal by the plaintiff of the district court's order granting summary judgment to the defendant, Dynamics Corporation of America.

2. That I am and at all times pertinent hereto have been counsel for the defendant, Dynamics Corporation of America and was the attorney who obtained the deposition of John B. Sevart, P.E. taken on May 15, 1987 in Wichita, Kansas.

3. As counsel for defendant, I requested that the court reporter provided me a copy of the transcribed deposition of John B. Sevart, P.E. and that this transcribed deposition was sent to me postmarked July 6, 1987.

Further Affiant sayeth naught.

/s/ William J. Gallion
WILLIAM J. GALLION

STATE OF KENTUCKY)
)
COUNTY OF FAYETTE)

Subscribed and sworn to before me by William J. Gallion on this the 24th day of November, 1987.

/s/ Elizabeth R. Hood
NOTARY PUBLIC, STATE AT LARGE

My Commission Expires:
10-9-89

CERTIFICATION

I hereby certify that the foregoing Affidavit has been served upon the parties by mailing a copy of same to Hon. James E. Thompson, BURNAM & THOMPSON, P.S.C., P.O. Box 726, Richmond, Kentucky 40475; Hon. William R. Garmer, SAVAGE, GARMER & ELLIOTT, P.S.C., 300 West Short Street, Lexington, Kentucky 40507; and Hon. James J. Varellas, VARELLAS, PRATT & COOLEY, Suite 400, 134 N. Limestone Street, Lexington, Kentucky 40507, on this the 24th day of November, 1987.

/s/ William J. Gallion
WILLIAM J. GALLION

Supreme Court, U.S.
FILED
DEC 20 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-758

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

EUGENE MCDOWELL,
Petitioner,

v.

DYNAMICS CORPORATION OF AMERICA,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

---

REPLY BRIEF FOR PETITIONER

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

No. 88-758

EUGENE MCDOWELL,

Petitioner,

v.

DYNAMICS CORPORATION OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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REPLY BRIEF FOR PETITIONER

The brief in opposition filed by respondent Dynamics Corporation of America ("Dynamics") confirms the need for review by this Court. On the first question, Dynamics seeks to excuse the reporter's admitted failure to file the deposition with the District Court on the ground that she failed to file it after decision, neglecting to mention that the deposition was completed and corrected more than one month *before* decision, and that Federal Rule 30(f)(1) requires "prompt" filing. Dynamics appears to be arguing that the reporter's failure to file the deposition should be excused because she failed to do *anything* with it in a timely fashion.

On the second question, Dynamics simply notes that those Circuits that recognize the inherent *power* of a

Court of Appeals to consider evidence not submitted to the District Court exercise discretion in deciding whether to do so in particular cases. This in no way mitigates the sharp and entrenched conflict with those Circuits—including the Sixth Circuit in this case—holding that there is no such power in the first place.

The Court Below Penalized Petitioner for the Reporter's Failure to Follow Rule 30(f)(1)

1. Federal Rule of Civil Procedure 30(f)(1) specifies that a reporter before whom a deposition is taken "shall promptly file it with the court in which the action is pending * * *." Dynamics expressly "agrees that the court reporter who took and transcribed the deposition of the petitioner's expert * * * failed to file a copy of the transcript, upon completion, with the District Court Clerk." Opp. Cert. at 11. This failure led directly to the entry of summary judgment against petitioner Eugene McDowell.

Dynamics seeks to excuse the reporter's failure by contending that the deposition was not ready for filing until July 6, 1987, after the District Court's June 30, 1987 decision. The facts refute this contention. The deponent's corrections were completed and sent to the reporter on May 27, 1987—more than a month before the trial court's grant of summary judgment. *See* Correction Sheet for Deposition of John B. Sevart, P.E. (certified May 27, 1987) (reprinted as an appendix hereto). Rule 30(f)(1) requires a reporter to file a deposition "promptly." All that Dynamics has shown is that the reporter not only failed to file the deposition as required by the Rule; she also failed to do *anything* with it "promptly."

As the Fifth and Eleventh Circuits have held, a party like McDowell is entitled to rely upon a court reporter following Rule 30(f)(1). *McDaniel* v. *Travelers Ins. Co.*, 494 F.2d 1189, 1190 (5th Cir. 1974); *Ross* v. *Kemp*, 785

F.2d 1467, 1471 (11th Cir. 1986). If the reporter had followed the Rule and "promptly file[d]" the deposition, summary judgment could not have been granted and could not have been upheld on appeal. McDowell should not—and, in the Fifth and Eleventh Circuits, would not—bear the consequences of the reporter's admitted failure.[1]

2. Dynamics also suggests that McDowell somehow failed to respond to the motion for summary judgment as required by Rule 56. This is untrue. McDowell responded to the only Dynamics motion that complied with Rule 56—the written one filed December 3, 1986—with a proper written opposition, noting the need to take the expert's deposition. Ct. App. J.A. 73-80. The District Court agreed and denied the motion. Pet. App. 21a-23a. When Dynamics orally renewed its motion, McDowell not only responded in kind—reminding the trial court that the deposition still needed to be taken—but also alerted the court in writing to the pendency of the Sevart deposition. Pet. App. 28a; Ct. App. J.A. 60-61. McDowell was under no obligation to do more. Indeed, all he had to do was *name* the witness supporting his claim in order to shift the burden to *Dynamics* to show that "the named witness' possible testimony raises no geninue issue of material fact." *Celotex Corp.* v. *Catrett*, 477 U.S. 317, 328 (1986) (White, J., concurring).[2]

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[1] Dynamics briefly contends that it would be entitled to summary judgment even if the deposition were considered. Opp. Cert. at 10. The court below did not agree, specifically noting that "[w]ithout the deposition testimony" McDowell failed to rebut the motion for summary judgment. Pet. App. 2a. In any event, the issue is whether the court below can consider the deposition, not what result it will reach on the merits if it does so.

[2] Petitioner recognizes, of course, that Justice White did not write the majority opinion. He did, however, write separately to provide the fifth vote for the majority, so his views must be regarded as controlling in construing the scope of the holding. *Marks* v. *United States*, 430 U.S. 188, 193 (1977).

Respondent Has Not Refuted the 5-4 Conflict Among the Circuits on the Inherent Authority of a Court of Appeals to Consider Evidence Not Presented to the District Court

1. The court below flatly ruled that it "cannot take into account [o]n appeal for the first time evidence not submitted to the district court." Pet. App. 2a. Dynamics does not dispute that the court below concluded it was wholly without power to consider the Sevart deposition. This ruling was in accord with holdings of the Third, Fifth, Seventh, and Tenth Circuits. *See* Pet. at 13-15. Again, Dynamics does not dispute that these Circuits agree that a federal appellate court has *no power* to consider evidence not presented to the trial court.

Four other Circuits have reached the opposite conclusion. Dynamics contends that petitioner is "fabricating" a conflict, but the holdings of the courts speak for themselves and could not be clearer. *See, e.g., Ross* v. *Kemp*, 785 F.2d at 1474 (court has "inherent equitable authority to enlarge the record and consider material that has not been considered by the court below"); *Turk* v. *United States*, 429 F.2d 1327, 1329 (8th Cir. 1970) (ordering record on appeal "enlarged" to include testimony "not presented to the district court"); *Gatewood* v. *United States*, 209 F.2d 789, 792 (D.C. Cir. 1953) ("due administration of justice" permits consideration on appeal of transcript that was not before trial judge and could not have been, since transcript was only prepared on order of Court of Appeals); *National Nutritional Foods Ass'n* v. *FDA*, 491 F.2d 1141, 1144 (2d Cir.) (Friendly, J.) ("A reviewing court has inherent power to obtain evidence needed to enable it to decide a contention of this sort"), *cert. denied*, 419 U.S. 874 (1974).

2. Dynamics cites some cases in which courts from Circuits recognizing the *power* to consider evidence not submitted to the trial court have declined to do so.[3] Such

[3] *See, e.g., In re Inspection of Norfolk Dredging Co.*, 783 F.2d 1526 (11th Cir.), *cert. denied*, 479 U.S. 883 (1986).

cases certainly do not mitigate the conflict; the issue that has divided the Circuits is whether an appeals court *can* consider such evidence, not whether it must do so in every case. The court below and the Third, Fifth, Seventh, and Tenth Circuits do not exercise discretion in declining to review such evidence; they believe they "cannot" consider it. Pet. App. 2a. The Second, Eighth, Eleventh, and District of Columbia Circuits, in contrast, believe they have "discretionary power to supplement the record on appeal, even to include evidence not reviewed by the court below." *First Alabama Bank* v. *Parsons Steel, Inc.*, 825 F.2d 1475, 1487 (11th Cir. 1987), *cert. denied*, 108 S. Ct. 1015 (1988). The exercise of that discretion in particular cases confirms rather than refutes the conflict.

3. Most of the cases relied upon by Dynamics on this point have nothing to do with the question presented. They instead invoke the general rule that *issues* not raised or decided below will not be considered for the first time on appeal.[4] That is not the question here. McDowell clearly raised his claims about Dynamics' defective machinery in a timely and appropriate manner. The question is rather whether an appellate court has any power to consider evidence in support of those claims that has not been submitted to the trial court, but is presented to the Court of Appeals.[5]

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[4] *See, e.g., Singleton* v. *Wulff*, 428 U.S. 106 (1976); *Brennan* v. *Maxey's Yamaha, Inc.*, 513 F.2d 179 (8th Cir. 1975); *Hardy* v. *Northwestern Federal Savings & Loan Ass'n*, 254 F.2d 70 (D.C. Cir. 1957); *Katsev* v. *Coleman*, 530 F.2d 176 (8th Cir. 1976).

[5] Contrary to Dynamics' contention, *Braverman* v. *United States*, 317 U.S. 49 (1942), does not support its position. The Court in that case declined to pass on a double jeopardy claim because the prior indictment was not a part of the record and the Court therefore could not determine if it charged the same offense. *Id.* at 55. In *Braverman*, the evidence was *never* presented, either to the trial or any appellate court. The question here is whether evidence that *is* presented to the appellate court can be considered.

4. Finally, contrary to Dynamics' contention, Fed. R. App. P. 10(e) does not govern the question presented. That Rule can be invoked to correct the record if "any difference arises as to whether the record truly discloses what occurred in the district court." Fed. R. App. P. 10(e). There is no "difference" between the parties here as to what occurred in the District Court. The record accurately reflects that the Sevart deposition was taken, was not promptly filed by the reporter as required by Rule 30(f)(1), and was therefore not before the District Court when it granted summary judgment. Indeed, the court below concluded that the introduction of new evidence in the Court of Appeals was beyond the scope of Rule 10(e). Pet. App. 7a. Whether a Court of Appeals has "inherent equitable authority" to consider such evidence apart from the circumstances covered by Rule 10(e) is the question on which the Circuits have sharply divided, *Ross* v. *Kemp*, 785 F.2d at 1474, and that question merits plenary review by this Court.

* * *

Because of a reporter's failure to follow the Federal Rules, McDowell lost his day in court on his claim against the manufacturer of machinery that left him an amputee. Because of its decision to follow the Third, Fifth, Seventh, and Tenth rather than the District of Columbia, Second, Eighth, and Eleventh Circuits, the court below regarded itself as wholly powerless to cure the reporter's failure and consider the critical deposition on appeal. This Court should grant the petition to confirm that an innocent party should not have to pay the price when an officer of the court fails to follow the Federal Rules, and to resolve the entrenched conflict among the Circuits.

CONCLUSION

For the foregoing reasons, and those in the petition, this Court should grant the writ and reverse the decision below.

Respectfully submitted,

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APPENDIX

In re: McDOWELL vs. DYNAMICS CORP.
Case. No. 83-329

CORRECTION SHEET FOR DEPOSITION OF JOHN B. SEVART, P.E.

Page	Line	Correction	Reason for Change
5	9	"to a" should be "like a"	Error
8	18	"just" should be "just asking"	"
9	3	"temporary" should be "primary"	"
9	15	This question is not correctly transcribed.	"
14	10	Add a comma after "design".	"
27	5	"furnishes." should be "furnishes"."	"
27	7	"attachment.' " should be "attachment."	"
39	7	"genreal" should be "general"	"
40	8	"but" should be "or"	"
52	11	"little John" should be "Little Giant"	"
62	24	"to the" should be "from the" and "of the" should be "to the".	"
66	17	"Johnson" should be "Johnson's"	"
71	4	"pocket" should be "packet"	"
71	25	"Balley" should be "Valley" (all places)	"

I certify that I have read my deposition in the above case and request that the above changes be made.

5-27-87
Date

/s/ John B. Sevart
Signature of Witness